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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-6825

WILL CATER, JR., Appellant

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Appellee

ON APPEAL FROM THE ILLINOIS APPELLATE COURT

THIRD JUDICIAL DISTRICT

JURISDICTIONAL STATEMENT

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INTRODUCTION

Will Cater, Jr. appeals from the judgment of the Illinois Appellate Court, Third Judicial District, affirming his conviction for aggravated kidnapping and upholding an Illinois juvenile transfer statute against the claim that its application to the appellant at bar violated the Fourteenth Amendment of the United States Constitution. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Illinois Appellate Court, Third Judicial District, is reported at 78 Ill. App. 3d 983, 398 N.E. 2d 28 (3rd Dist. 1979). A copy of the opinion is attached hereto as Appendix A. A copy of the order of the Appellate

Court denying rehearing may be found at Appendix B. A copy of the order of the Illinois Supreme Court denying leave to appeal may be found in Appendix C.

JURISDICTION

The decision of the Illinois Appellate Court in this case, affirming appellant's conviction for aggravated kidnapping, was issued on November 13, 1979 (See Appendix A). Rehearing was sought, but denied on January 15, 1980 (See Appendix B). A petition for leave to appeal was filed, but was denied by the Illinois Supreme Court on March 27, 1980 (See Appendix C). Notice of Appeal to the United States Supreme Court was filed on June 6, 1980, in the Illinois Appellate Court for the Third Judicial District and on June 6, 1980, in the Circuit Court of Will County, Illinois (See Appendix D).

This case is properly before the Court because the validity of a State statute was drawn into question below "on the ground of its being repugnant to the Constitution . . . of the United States, and the decision was in favor of its validity". 28 U.S.C. §1257(2). Cases sustaining the jurisdiction of this Court to review the judgment herein are: Cohen v. California, 403 U.S. 15, 17-18, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n.3, 83 S. Ct. 631, 9 L. Ed. 2d 584, 588 (1963); and Interstate Circuit v. Dallas, 390 U.S. 676, 678 n. 1, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968).

QUESTION PRESENTED

IS THE ILLINOIS JUVENILE TRANSFER STATUTE, AS INTERPRETED BY THE ILLINOIS SUPREME AND APPELLATE COURTS, AND AS APPLIED TO THE APPELLANT, UNCONSTITUTIONAL BECAUSE IT FAILS TO PROVIDE

ADEQUATE DUE PROCESS SAFEGUARDS SUCH AS AN ARTICULATED BURDEN OF PROOF AND GUIDELINES FOR THE RELATIVE WEIGHT TO BE GIVEN THE SIX STATUTORY FACTORS THE JUVENILE COURT MUST CONSIDER BEFORE TRANSFERRING A MINOR TO ADULT COURT.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Fourteenth Amendment, United States Constitution

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the legal protection of the law.

Illinois Revised Statutes 1973, Chapter 37, Section 702-7

> Criminal Prosecutions Limited. (1) Except as provided in this Section, no minor who was under 17 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State or for violation of an ordinance of any political subdivision thereof.
>
> (2) Subject to paragraph (1) of Section 2-8, any minor alleged to have committed a traffic, boating or fish and game law violation or an offense punishable by fine only may be prosecuted therefor and if found guilty punished under any statute or ordinance relating thereto, without reference to the procedures set out in this Act.
>
> (3) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, and, on motion of the State's Attorney, a Juvenile Judge, designated by the Chief Judge of the Circuit to hear and determine such motions, after investigation and hearing but before commencement of the adjudicatory hearing, finds that it is not in the best interests of the minor or of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.
>
> (a) In making its determination on a motion to permit prosecution under the criminal laws, the court shall consider among other matters: (1) whether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly

available to the Juvenile Court for the treatment and rehabilitation of the minor; and (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody and under supervision for a period extending beyond his minority. The rules of evidence shall be the same as under Section 5-1 of this Act.

(b) If criminal proceedings are instituted, the petition shall be dismissed insofar as the act or acts involved in the criminal proceedings are concerned. Taking of evidence in an adjudicatory hearing in any such case is a bar to criminal proceedings based upon the conduct alleged in the petition.

(4) Nothing in this Act prohibits or limits the prosecution of any minor for an offense committed on or after his 17th birthday even though he or she is at the time of the offense a ward of the court.

(5) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, the minor, with the consent of his counsel, may, at any time before commencement of the adjudicatory hearing, file with the court a motion that criminal prosecution be ordered and that the petition be dismissed insofar as the act or acts involved in the criminal proceedings are concerned. If such a motion is filed as herein provided, the court shall enter its order accordingly. Amended by P.A. 77-2096, §1, eff. Jan. 1, 1973; P.A. 78-341, §1, eff. Oct. 1, 1973.

STATEMENT OF THE CASE

On July 14, 1977, the appellant, Will Cater, Jr., then 16 years old was apprehended by the Omaha, Nebraska, police for the offenses of armed robbery and aggravated kidnapping. Cater, a sixteen year old high school student from Xenia, Ohio, with no prior history of juvenile or adult criminal behavior, was travelling with two juveniles and one adult companion. The incident which resulted in the criminal prosecution arose out of Cater's participation in the July 13, 1977, commandeering of an automobile on Interstate 80 belonging to one Robert Shook. Cater and his three companions, two armed with handguns, forced Shook to drive with them and accompany them to Nebraska. Cater was not armed, but participated to the extent of driving the car for about one hour and issuing a verbal threat to the victim.

Juvenile Court Proceedings

On July 15, 1977, a two count delinquency petition was filed against the appellant, Will Cater, Jr. (A2). The petition charged the appellant with Armed Robbery and Aggravated Kidnapping, violations of Illinois Revised Statutes 1975, Chapter 37, Section 702-2, Chapter 38, Sections 18-2(a) and 10-2(a)(5) respectively.

On July 18, 1977, the State filed a motion to remove the prosecution from under the Juvenile Court Act (A5-6) and on July 28, 1977, a hearing was held on the State's motion.

Testifying at the hearing was the complaining witness, Robert Shook. Shook testified that in the late evening of July 13, 1977, he was driving his car onto the entrance ramp to Interstate Route 80 near Joliet, Illinois, when two men walked out in front of his car. Shook reported that he applied the brakes and his car slid sideways. The next thing he knew guns were pointed at his face. The two men got in his car and threatened him. He was told to start driving and to pick up two of the men's friends down the road. About fifty yards down the road he picked up the appellant, Will Cater, Jr., and another man. Thereafter the appellant drove at the order of one of his companions who had a gun. The victim Shook testified that the appellant had personally threatened him. While Cater was driving, Shook, who was then sitting in the back seat of the car, was robbed at gunpoint of his wallet containing $48 by one of the men with a gun. The appellant and his companions then forced Shook to accompany them to Nebraska where they left the vehicle. Shook then notified the police. The appellant and the other three men were then arrested in Omaha, Nebraska (A11-19).

During cross-examination, by Cater's appointed counsel, Shook related that an older co-defendant of Cater's appeared to be the ringleader because he was doing most of the talking and was giving most of the threats (A16). Shook considered

Cater to be one of the "lesser assaulters" (A16). He stated that the only time Cater threatened him or got angry was when Shook started to drive (A16) and that Cater did not have a gun at any time during the occurrence (A15). [At trial he testified that Cater threatened him twice (A98)]. Shook further related that he was never physically struck by Cater. The complainant also revealed that Will Cater drove the car for forty-five minutes to an hour and slept the rest of the time (A16-17).

The State called Louis Stalzer to testify at the transfer hearing. He related that he was the probation officer for the juvenile section in Will County. He further stated that there were no facilities for delinquent juveniles in Will County and that the facilities of the Department of Corrections would better serve the needs of the juvenile because of the nature of the charge (A19).

No evidence was presented at the transfer hearing with respect to the background of Will Cater, Jr. [Despite the fact that no evidence was received on this point, the juvenile court judge stated that he had considered Cater's background before making his decision to transfer (A20-21).] If evidence had been presented as to Cater's background, it would have revealed that he was an average high school student with no previous record of juvenile delinquency or adult criminal court dispositions (A38-50).

After hearing arguments of counsel, the court granted the State's motion and removed Will Cater, Jr. from the jurisdiction of the juvenile court. In granting the State's motion the court found that it was not in the best interest of the minor and security of the public to proceed under the Juvenile Court Act. As support for its decision the Court simply recited the six statutory factors (A7-8, 20-21). [See Ill. Rev. Stat. 1973, ch. 37, §702-7(3)(a).]

Adult Court Proceedings

On August 3, 1977, a bill of indictment was filed against Will Cater and his three co-defendants (A22-24). The indictment charged Cater with the offenses of aggravated kidnapping and, under a theory of accountability, with the offense of armed robbery (A24).

On October 13, 1977, Cater's case proceeded to a jury trial on the charges of armed robbery and aggravated kidnapping (A91 et seq). The jury found Cater not guilty of armed robbery and guilty of aggravated kidnapping (A29, 30, 175).

Prior to Cater's sentencing hearing, a pre-sentence investigation report was prepared. This report revealed that Cater had no previous record of juvenile delinquency or adult criminal court dispositions (A39). The report stated that the petitioner was a high school student with no apparent difficulties. He played for his high school basketball team and had spent his summers working (A44-47). The report also contained two letters from Cater's high school teachers in Xenia, Ohio. The letters noted that Cater was a "follower" and was "easily influenced by others" (A35-36). This information had not been presented to the juvenile court at Cater's transfer hearing.

Appellant was subsequently sentenced to a minimum term in the penitentiary of from four (4) years to four (4) years and one (1) day to be served in the Juvenile Division of the Illinois Department of Corrections (A193). A timely notice of appeal was filed and the Illinois Office of the State Appellate Defender was appointed to represent the appellant (A33, 32).

Appellate Court Proceedings

The appellant raised the following issues in the Third District Appellate Court: a) Whether his transfer from the juvenile court violated the Fourteenth Amendment of the Federal

Constitution where the Illinois Juvenile Transfer Statute fails to set forth an articulated standard of proof and because the statute violates due process in failing to set forth how the trial court is to weigh the six statutory factors designed to guide the court; b) whether the circuit court abused its discretion in transferring sixteen year old Will Cater from under the jurisdiction of the Juvenile Court; c) whether the defendant was denied his right to treatment under the Juvenile Court Act where the circuit court failed to make a bona fide determination as to the appellant's amenability to treatment as a juvenile; and d) whether the appellant was denied his right to a fair trial when the trial court refused to instruct the jury on the defense of necessity.

The Appellate Court resolved each of these issues against the appellant and affirmed his conviction of aggravated kidnapping. In addressing Cater's attack upon the constitutionality of the Illinois Juvenile Transfer Statute, the Third District Appellate Court relied exclusively upon a recent opinion of the Illinois Supreme Court in People v. Taylor, 76 Ill. 2d 289, 391 N.E. 2d 366 (1979). In this regard the Appellate Court simply stated:

> The Illinois Supreme Court in *Taylor* interpreted the juvenile transfer statute, as adopted by the legislature in response to the case of *Kent v. U.S.* (1966), 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84, as satisfying the constitutional requirements of due process. The *Taylor* opinion clearly recites the law on the multiple sub-issues argued by defendant Cater in claiming the statute here is unconstitutional. We adhere to the reasoning espoused in the *Taylor* opinion and conclude as the Supreme Court did that the transfer statute (Ill. Rev. Stat. 1977, ch. 37, par. 702-7) is constitutional. 78 Ill. App. 3d at 985, 398 N.E. 2d at 30-31.

After rehearing was denied in the Appellate Court, appellant petitioned the Illinois Supreme Court for leave to appeal. One of appellant's requests, in his petition for leave

to appeal, was to have the Illinois Supreme Court reconsider its decision in People v. Taylor, 76 Ill. 2d 289, 391 N.E. 2d 366 (1979). This petition was denied.[1]

THE QUESTION IS SUBSTANTIAL

INTRODUCTION

This Court's decisions in Kent v. United States, 383 U.S. 541 (1966) and In re Gault, 387 U.S. 1 (1967) established that a juvenile court waiver proceeding must measure up to the essentials of due process and fair treatment. The question presented by this appeal is substantial because it seeks to determine exactly what safeguards are required at a juvenile court waiver hearing in order for it to comport with due process under the Fourteenth Amendment of the Federal Constitution.

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[1]The defendant in Taylor sought review by this Honorable Court. However the Illinois Supreme Court refused to stay its mandate which ordered that the defendant be given a new trial. (The defendant in Taylor had prevailed on another unrelated argument). Taylor then filed an Application for Stay of Mandate or Recall of Mandate of the Illinois Supreme Court with the Honorable Justice Stevens of this Court. The Application (No. A-5), was denied on July 18, 1979. The Application was then presented to the Honorable Justice Marshall and again denied on July 26, 1979. Thus the merits of the Illinois Supreme Court's decision in Taylor were never reached by this Court.

Since the Illinois Appellate Court's opinion, upholding the constitutionality of the Illinois Juvenile Transfer Statute, is based exclusively on the earlier opinion of the Illinois Supreme Court in People v. Taylor, 76 Ill. 2d 289, 391 N.E. 2d 366 (1977), much of the legal discussion which follows will be addressed to what was stated by the Illinois Supreme Court in People v. Taylor (A copy of the opinion is set forth in full at Appendix E).

The determination of what due process rights should govern the procedure of allowing minors to be prosecuted as adults "depends upon whether the respondent's interest in avoiding that loss outweighs the governmental interest in summary adjudication . . .". Goldberg v. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, 25 L. Ed 2d 287 (1970). The decision to allow the criminal prosecution of a juvenile has been viewed by some courts and commentators as the most severe sanction that may be imposed by the juvenile court. In Kemplen v. Maryland, 428 F. 2d 169, 174 (CA. 4, 1970), the court said that "nothing can be more critical to the accused than determining whether there will be a guilt determining process in an adult type criminal trial." (emphasis original). One commentator has also stated that ". . . There is convincing evidence that most juvenile court personnel and the judges themselves regard the waiver of jurisdiction as the most severe sanction that may be imposed by the juvenile court." Schornhorst, The Waiver of Juvenile Court Jurisdiction: Kent Revisited, 43 Ind. L. J. 583, 586-7 (1968).

The following two issues, which were not reached in Kent, are presented in Cater's case and were presented to the Illinois Supreme Court in People v. Taylor: (a) whether due process permits a juvenile court to allow adult prosecution of a minor on less than a preponderance of evidence and under a statute that articulates no burden of proof; (b) whether the statute violated due process in failing to set forth how the trial court is to weigh the six factors designed to guide the court.

As previously stated, in determining what due process rights govern at a juvenile transfer hearing, one must weigh the minor's interest in avoiding the loss occasioned by a

transfer to adult court against the governmental interest in summary adjudication. Will Cater's case demonstrates the severe consequences attendant upon a transfer.

Upon the decision to allow adult prosecution, Cater lost his right to services necessary to his proper development, including health, education and social services. See Ill. Rev. Stat. 1973, ch. 37, §701-2(3). Cater also lost the right, upon removal from his family, to have the State secure for him custody, care and discipline closely equivalent to that which should have been given by his parents. See Ill. Rev. Stat. 1973, ch. 37, §701-2. Furthermore, had Cater been adjudicated delinquent rather than found guilty in this case, the duration of wardship could not last past the time that Cater attained the age of twenty-one (21). However under the adult criminal system there was no statutory limit on the possible maximum sentence for Cater's offense. See Ill. Rev. Stat. 1975, ch. 38, §§10-2, 1005-8-1(b)(2).

The loss of the right to non-criminal process thus entails the loss of liberty and must fall within the protection of the Fourteenth Amendment. An examination of the State court's opinions in People v. Taylor and in this case reveals no mention of any state interest in proceeding in the current arbitrary fashion, let alone one that outweighs the minor's interests in avoiding the consequences described above.

A.

Due Process Requires That The Juvenile Transfer Hearing Be Governed By An Articulated Standard Of Proof

Requiring evidence to be measured against an articulated standard of proof is perhaps the most essential element of all the due process safeguards, which seek to avoid "unfairness to

individuals and inadequate or inaccurate findings of fact." In Re Gault, 387 U.S. 1, 19-20, 87 S. Ct. 1428, 18 L. Ed. 2d 547 (1971). Appellant argued below that more than a mere preponderance of the evidence was necessary to afford due process at this critical stage of the proceedings and that at least a burden of clear and convincing evidence was necessary to protect the rights at stake and promote an accurate fact finding process.[2] The Illinois courts held that an articuable standard of proof was constitutionally unnecessary in the context of a juvenile transfer hearing.

In Kent v. United States this Court noted that the District of Columbia "Juvenile Court Act confers upon the child a right to avail himself of that Court's 'exclusive' jurisdiction." 383 U.S. at 560. In other words the District of Columbia Juvenile Court Act created a strong presumption that a minor, charged with a criminal offense, would be treated as a juvenile. Similarly, the Illinois Juvenile Court Act also creates a strong presumption of treatment in the juvenile system. See Ill. Rev. Stat. 1975, ch. 37, §§701-2, 702-1, 702-7. The Appellate Court below recognized the existence of a strong presumption for juvenile court treatment (398 N.E. 2d at 32), yet rejected the argument that an articuable standard of proof was necessary to overcome this

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[2]A clear and convincing burden of proof has been adopted as the standard to be applied at juvenile transfer proceedings in the national standards for juvenile justice. The Juvenile Justice Standards Project began in 1971 by the Institute of Judicial Administration of New York City and was later joined by the American Bar Association. The IJA/ABA Joint Commission on Juvenile Justice Standards has drafted twenty volumes of standards that have been adopted by the American Bar Association in 1979 and 1980. The Transfer Standards require, in part, that the judge must find both (1) probable cause to believe the juvenile committed an offense that, if committed by an adult, would be punishable by death or by imprisonment for more than twenty years, and (2) clear and convincing evidence that the juvenile is not amenable to juvenile court treatment. [Sec. 2.2(a)(1) and (2)]. Moreover, Subsection 2.3(e) requires that the burden of proof at the transfer hearing, both for probable cause and nonamenability findings should be on the prosecutor.

These standards have just recently been published by the Ballinger Publishing Company. The standards referred to above can be found in the volume entitled IJA/ABA Juvenile Justice Standards Relating to Transfer Between Courts.

presumption. It is illogical to recognize the existence of a strong presumption and on the other hand not govern the manner in which that presumption is overcome. In order for this strong presumption to have any real significance it must be governed by an articuable standard of proof.

One commentator summarized the problems arising from the Illinois statute's failure to set forth any burden as follows:

> Finally, and perhaps most significantly, the statute is silent as to what, if any, evidentiary burden must be met regarding the criteria at the transfer hearing. There is no indication that the juvenile court judge is obligated to hear evidence from both parties on each and every one of the standards. The statute appears to countenance the possibility that a transfer order could issue without any evidence having been presented on one or more of the designated factors. Neither is any indication given as to what kind of testimony is to be presented at the hearing. The statute allows for the admission of the opinions of a nonexpert witness, as well as for the admission of hearsay. There is no indication of whether the state bears the burden of presenting evidence to counter specific contentions made on the juvenile's behalf particularly on the issue of the availability of treatment at the juvenile court level.

Comment, Juvenile Transfer In Illinois, 67 Journal of Criminal Law and Criminology 287, 304 (1977). In order to resolve these problems the statute or the court must enunciate a burden of proof. Additionally, counsel must have advance notice of the burden employed to adequately prepare his case.

It should be noted that the possibility envisioned by the above commentator -- "that a transfer order could issue without any evidence having been presented on one or more of the designated factors" -- in fact occurred in the case at bar. There was absolutely no evidence of Cater's previous history presented at his transfer hearing. Furthermore the only evidence presented on the question of whether there were facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor was the testi-

mony of a probation officer that there were no facilities in Will County for delinquent juveniles and that, because of the nature of the charge against Cater, the Department of Corrections would better serve his needs (A19). There was no indication that the probation officer ever interviewed Cater or examined his background prior to reaching this conclusion. The probation officer did not give any testimony regarding the availability of state treatment facilities (other than the Department of Corrections), private facilities or facilities available in other counties.

The Illinois Supreme Court in Taylor not only rejected the contention that a clear and convincing standard of proof was constitutionally required, but also rejected the argument that due process required an articulated standard of proof of any sort at a juvenile transfer hearing. In reaching this result, the Court in Taylor compared the juvenile transfer procedure to a sentencing type procedure. The Court stated:

> "[T]he State need only present evidence sufficient to persuade the trial court, in the sound exercise of its discretion, that in light of the statutorily prescribed criteria transfer is warranted." 391 N.E. 2d at 372.

Where evidence is taken, it must be governed by a burden of proof. This distinguishes the transfer proceeding from a sentencing hearing where evidence need not be introduced before a judge sentences a defendant. See Specht v. Patterson, 386 U.S. 605, 608-609 (1967), where this Court rejected a similar sentencing analogy. Unlike the sentencing function, the trial judge at the transfer hearing has heard no previous evidence concerning the case and does not have before him a finding of guilt. A burden of proof is necessary to minimize the error with regard to the factual determinations required by the statute. That factual determinations are required is evident from the language

in Kent v. United States that holds that a reviewing court must "have before it a statement of reasons motivating the waiver including, of course, the statement of the relevant facts." 383 U.S. at 560-561.

The importance of this question is demonstrated by the previous cases in which this Court has determined what standard of proof is required by the Fourteenth Amendment in various contexts. Addington v. Texas, 441 U.S. 418 (1979) ("clear and convincing" standard of proof required in a state involuntary mental health commitment proceeding); In Re Winship, 397 U.S. 358 (1970) (reasonable doubt standard of proof required in a juvenile delinquency adjudicatory hearing); Speiser v. Randall, 357 U.S. 513 (1958) (due process violated by state constitutional provision which placed burden on California taxpayer, eligible for exemption, of establishing that he was not an advocate of the unlawful overthrow of the state or federal government). Also see United States v. DiGileo, 538 F. 2d 922, 988 (CA. 3, 1976) (due process requires that the government bear the burden of proof at a mental competency hearing)

B.

The Statute Violates Due Process in Failing to Set Forth The Relative Weight to be Given to Each of the Six Factors Designed to Guide The Court And Further In Failing to Require a Statement of Reasons Explaining The Transfer Order.

Although the Illinois Juvenile Transfer statute includes a series of criteria designed to guide the Juvenile Court in arriving at a transfer decision, the statute fails to state how those factors are to be relatively weighed. See Ill. Rev. Stat. 1973, ch. 37, §702-7(3). As written, the statute allows the possibility that a transfer order could issue without any evidence having been presented on one or more of the factors. As previously mentioned, this possibility in fact occurred here. There was no evidence presented as to Cater's previous

history and very little evidence presented on facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor.

Despite the fact that there was no evidence presented on at least one of the factors and inadequate evidence presented on one other factor, the juvenile transfer judge stated that he had considered each of the six statutory factors in making the decision to transfer (A7-8, 20-21). Apparently it makes little difference what the reasons for the transfer were, just so long as the juvenile court gives a litany of the six statutory criteria for the record. Both the Appellate Court here and the Illinois Supreme Court in Taylor have approved of this type of procedure. The effect of this holding is to circumvent the minor's right to appeal from the juvenile court judge's determination of this issue. Without a meaningful statement of reasons by the juvenile court judge, the appellant has no effective means of showing that the lower court erred.

The procedure employed here is condemned in Kent v. United States, which required a statement of relevant facts in order to assure meaningful review. An appellate court "may not" as this one did, "'assume' that there are adequate reasons . . ." Kent v. United States, 383 U.S. 541, 561 (1966).

The difficulties faced by appellant because of the statute's failure to set forth the relative weight to be given to each of the six criteria and its failure to require a meaningful statement of reasons by the juvenile court, are perhaps best demonstrated by appellant's unsuccessful attempt in the case at bar to demonstrate that the juvenile court erroneously decided to transfer him.

In arguing in the Appellate Court that the juvenile judge abused his discretion, appellant focused upon the statutory criteria which seemed to have the greatest relevance to

the ultimate issue; i.e., whether juvenile court treatment "is not in the best interests of the minor or of the public" [Ill. Rev. Stat. 1973, ch. 37, §702-7(3).] Thus appellant stressed the fact that there was no evidence presented as to Cater's previous background and if there had been evidence presented as to prior history, it would have revealed no prior offenses and a rather normal childhood. Also emphasized was the fact that the testimony of the probation officer, as to the availability of treatment facilities for this particular juvenile, was inadequate since resources outside of the county were not explored and since Cater himself was apparently never interviewed by the probation officer. It was further argued that while the offense was serious and committed in an aggressive manner, Cater's participation in the offense was less than that of his three co-defendants and that he was influenced by the pressures of one of the co-defendants who was an adult. It was also noted that the victim of the kidnapping was released unharmed. Appellant conceded that his age (16-1/2) was one factor that weighed against him.

In addition to stressing the factors most relevant to the ultimate determination of transfer, appellant noted that one of the factors was absolutely meaningless to the trial court's exercise of discretion (whether there is sufficient evidence upon which a grand jury may be expected to return an indictment)[3] and that another factor -- whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority -- was in

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[3]Evidence sufficient for a grand jury indictment (probable cause) is a necessary prerequisite to all adult criminal court proceedings and is a necessary prerequisite to detention of a juvenile prior to a hearing on a delinquency petition. Ill. Rev. Stat. 1975, ch. 37, §703-6. Furthermore, the ultimate standard of proof at both a juvenile delinquency proceeding and an adult criminal trial is identical at both proceedings -- beyond a reasonable doubt. In Re Winship, 397 U.S. 358 (1970).

essence repetitive of the ultimate issue that needed to be adjudicated.

In rejecting the appellant's contention the Appellate Court stated:

> Fundamental fairness does not require the juvenile judge to exercise his discretion with any degree of mathematical certainty. Not all of the factors set forth in the transfer statute need be resolved against the juvenile to justify a waiver of juvenile court jurisdiction. [People v. Taylor, (1979), 76 Ill. 2d 289, 39 Ill. Dec. 103, 391 N.E. 2d 366)]. We agree with the holding in Taylor, "[t]hat under our [present] statute the State need only present evidence sufficient to persuade the trial court, in the sound exercise of its discretion, that in light of the statutorily prescribed criteria transfer is warranted." [76 Ill. 2d at 303, 304, 29 Ill. Dec. at 109, 391 N.E. 2d at 372]. The record manifestly supports the trial judge's finding that it was not in the best interest of the minor and the public to proceed under the juvenile court act, but that the best interest of the minor and the security of the public required that the minor defendant continue in custody for a period extending beyond his minority. The trial court did not abuse its discretion in permitting the criminal prosecution in the present case. People v. Cater, 398 N.E. 2d 28, 32.

In summary on this point, the Appellate Court's cursory application of a fundamental fairness standard in resolving this issue, the failure of the statute or the reviewing courts to mandate a meaningful statement of reasons by the juvenile trial judge and the fact that the statute fails to set forth the weight to be given each of the factors result in a situation in which juveniles are effectively denied a meaningful review of the juvenile court's decision to transfer.[4]

---

[4]Further support for this conclusion can be found by examining Illinois case law in which it has been argued that the juvenile court erred in ordering that a minor be transferred to adult court. There are no Illinois cases in which a reviewing court has reversed the juvenile court's decision to transfer a minor to the jurisdiction of the adult criminal court. The argument was made and rejected in the case at bar and each of the following cases: People v. Underwood, 72 Ill. 2d 124, 378 N.E. 2d 513 (1978) affirming, 50 Ill. App. 3d 908, 365 N.E. 2d 1370 (1977); People v. DeVore, 62 Ill. App. 3d 412, 378 N.E. 2d 1302 (1978); People v. Curry, 31 Ill. App. 3d 1027, 335 N.E. 2d 515 (1975); People v. Banks, 29 Ill. App. 3d 923, 331 N.E. 2d 561 (1975).

C. Double Jeopardy Problems Would Not Be Created By Requiring An Articulated Burden of Proof, Guidelines For Weighing The Six Statutory Criteria, And A Meaningful Statement Of Reasons By The Juvenile Judge Explaining The Transfer Order.

The Illinois Supreme Court, in rejecting the constitutional attack upon the Illinois transfer statute, cited to this Court's decision in Breed v. Jones, 421 U.S. 519 (1975) and noted that the end result of the procedures requested by the defendant-Taylor,

> . . . would be to make the proceedings more formal and adversarial, thus increasing the expense, delay, strain and embarassment that are the warning signs of double jeopardy problems. People v. Taylor, 391 N.E. 2d 366, 374.

The fears expressed by the Illinois Supreme Court are without merit for the simple reason that the factual issues to be determined at a transfer hearing are totally different from those to be decided at an adult criminal trial. At a transfer hearing the ultimate issue is whether the minor is amenable to treatment as a juvenile without endangering the public interest. At a trial the issue is whether the minor committed the offense as charged beyond a reasonable doubt.[5]

The issue presented by Breed v. Jones, 421 U.S. 519 (1975) is totally different from that involved here. In that case the minor was found delinquent after an adjudicatory hearing. The

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[5]While one of the statutory criteria to be considered at a juvenile transfer hearing is probable cause that the minor committed the offense, this factor is of least significance. Furthermore, appellant is not contending that the evidence on this particular factor be governed by an articulated standard of proof, but rather that the ultimate issue -- amenability to treatment without endangering the public -- be governed by a standard of proof. Finally, this Court in Breed v. Jones noted that nothing prohibited the state from requiring at transfer hearings substantial evidence that the juvenile committed the charge. 421 U.S. 519, 537 n. 18 (1975).

minor was then transferred and convicted as an adult. Thus the minor was twice put through an adjudicatory hearing on the issue of his guilt or innocence. In the situation at bar the transfer hearing simply determines which forum will make a single adjudication as to the minor's guilt or innocence.

As the above demonstrates, the question presented is so substantial as to require plenary consideration for its resolution. In the alternative, appellant requests that this Court summarily reverse the judgment below.

Respectfully submitted,

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(815) 434-5531

COUNSEL FOR APPELLANT

MICHAEL MULDER
Assistant Defender

MICHAEL FILIPOVIC
Assistant Defender

OF COUNSEL

APPENDIX A

OPINION OF ILLINOIS APPELLATE COURT, THIRD DISTRICT

In *Bender*, the case had already been dismissed once for failure to appear for a discovery deposition. That dismissal was vacated and discovery set for 1:30 P.M. on October 24, 1973. The attorney and his client arrived at the other attorney's office at 1:00 P.M., found no one there and left, the plaintiff informing his attorney, erroneously it would appear, that Kankakee businessmen took Wednesdays off. Unlike *Bender*, here the case had not previously been dismissed for failure to comply with discovery, and the plaintiffs neither knew of the discovery proceedings nor caused the noncompliance. Likewise, *Goldman* also involved a situation where the case had already been dismissed once before for failure to comply with discovery. Furthermore, the plaintiff in that case did not seek to vacate the dismissal until seventeen months after the order was entered. Similarly, in *Danforth*, the plaintiff was seeking to have the dismissal vacated under a section 72 motion. The court in that case remarked that the argument that fundamental fairness demands a trial on the merits might be persuasive if urged in the trial court before the expiration of the thirty day period. In the present case, unlike in *Goldman* and *Danforth*, the motion to vacate was filed within that thirty day period.

In light of the purpose behind Supreme Court Rule 219(c) and the fact that the plaintiffs' noncompliance was not contumacious we believe the dismissal of the case and the subsequent refusal to vacate the dismissal were an abuse of the court's discretion. This is not to say that a lesser sanction would not be appropriate. Likewise, since the plaintiffs are not entitled to an unlimited time to comply with the defendants' discovery requests (*In re Estate of Fado* (1976), 43 Ill.App.3d 759, 2 Ill.Dec. 218, 357 N.E.2d 195), it would be appropriate to condition reinstatement upon the plaintiffs' compliance with discovery.

II.

[7] Medtronic has also sought affirmance upon the grounds that since the plaintiffs never replied to the request to admit, they have admitted the facts stated therein and have no cause of action. The request to admit was filed on Feburary 15, 1978. By Supreme Court Rule 216, the plaintiffs were required to deny the allegations within 28 days or they stood admitted. The suit was dismissed with prejudice on March 14, 1978, twenty seven days after the request to admit was filed. With the dismissal, the request became moot and there was no reason to answer it. Accordingly, the plaintiffs' failure to file a denial on March 15, 1978 did not act as an admission of the allegations contained in the request.

For the foregoing reasons, the order of dismissal entered March 14, 1978 is reversed and the cause remanded to the circuit court of Cook County with directions to allow reinstatement of the complaint upon such reasonable terms as may be appropriate and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

JOHNSON and LINN, JJ., concur.



78 Ill.App.3d 983
34 Ill.Dec. 353

PEOPLE of the State of Illinois, Plaintiff-Appellee,

v.

Will CATER, Jr., Defendant-Appellant.

No. 78-113.

Appellate Court of Illinois, Third District.

Nov. 13, 1979.

Rehearing Denied Jan. 15, 1980.

The Circuit Court, Will County, Michael J. Orenic, J., granted State's motion to transfer defendant from juvenile jurisdiction to allow prosecution as an adult. Thereafter, defendant was convicted in the

Circuit Court, Will County, Charles P. Connor, J., of aggravated kidnapping, and he appealed. The Appellate Court, Barry, J., held that: (1) juvenile transfer statute is constitutional; (2) juvenile judge did not abuse his discretion in transferring defendant from juvenile jurisdiction to allow prosecution as an adult; and (3) despite presence of some evidence on defense of necessity, trial court correctly refused to give defendant's tendered jury instruction on that defense for reason that the tendered instruction was only a recitation of statutory law, did not attempt to apply the law it purported to state to the facts of the case and might have misled jury.

Affirmed.

1. Constitutional Law ⇐255(4)
Infants ⇐68.2

Juvenile transfer statute satisfies the constitutional requirements of due process and is constitutional. S.H.A. ch. 37, § 702–7; U.S.C.A.Const. Amend. 14.

2. Infants ⇐68.7(2)

Juvenile transfer statute gives juvenile court a substantial degree of discretion as to factual considerations to be evaluated, weight to be given them, and conclusion to be reached. S.H.A. ch. 37, § 702–7.

3. Infants ⇐68.8

Role of an appellate court in determining propriety of a transfer of a juvenile to be prosecuted as an adult is to determine whether, in evaluating evidence presented at hearing on motion to transfer, juvenile judge has abused his discretion in light of the statutory criteria; no formal statement of juvenile judge's reasons for authorizing the transfer is necessary as long as the record will allow a meaningful review of juvenile judge's exercise of discretion. S.H.A. ch. 37, § 702–7.

4. Infants ⇐68.7(2)

Juvenile judge did not abuse his discretion in transferring defendant from juvenile jurisdiction to allow prosecution as an adult on charges of armed robbery and aggravated kidnapping. S.H.A. ch. 37, § 702–7.

5. Infants ⇐68.7(2)

Juvenile judge, in determining propriety of a transfer of a juvenile to be prosecuted as an adult, is not required to exercise his discretion with any degree of mathematical certainty; not all of the factors set forth in transfer statute need be resolved against the juvenile to justify a waiver of juvenile court jurisdiction. S.H.A. ch. 37, § 702–7.

6. Infants ⇐68.7(3)

Under juvenile transfer statute, state need only present evidence sufficient to persuade trial court, in the exercise of its discretion, that in light of statutorily prescribed criteria, transfer is warranted. S.H.A. ch. 37, § 702–7.

7. Infants ⇐68.7(3)

Presumption that minors are to be treated within juvenile system and that minor has right to treatment under Juvenile Court Act may be overcome by juvenile judge's consideration of the criteria enumerated in transfer statute. S.H.A. ch. 37, §§ 701–1 et seq., 702–7.

8. Criminal Law ⇐739(1)

A defendant is entitled to have jury consider any legally recognized defense which is supported by some evidence in the record.

9. Criminal Law ⇐772(6)

Despite presence of some evidence on defense of necessity, trial court correctly refused to give defendant's tendered jury instruction on that defense for reason that the tendered instruction was only a recitation of statutory law, did not attempt to apply the law it purported to state to the facts of the case and was capable of misleading jury.

10. Criminal Law ⇐38

Major distinction between defenses of compulsion and necessity is that in the former the source of coercive power is from a human being and in the latter the coercive power has traditionally arisen from forces of nature. S.H.A. ch. 38, § 7–13.

Michael Filipovic and Robert J. Agostinelli, Deputy State Appellate Defender, Ottawa, for defendant-appellant.

Terry A. Mertel, Rita F. Kennedy and John X. Breslin, State's Attys. Appellate Service Commission, Ottawa, for plaintiff-appellee.

BARRY, Justice:

On July 14, 1977, the defendant, Will Cater, Jr., then 16 years old was apprehended by the Omaha, Nebraska police for the offenses of armed robbery and aggravated kidnapping. The incident which resulted in the criminal prosecution arose out of Cater's participation in the July 13, 1977, commandeering of an automobile on Interstate Route 80 belonging to Robert Shook. Cater and his three companions, two armed with handguns, forced Shook to drive with them and accompany them to Nebraska. Cater, himself, was not armed and participated to the extent of driving the car for sometime and also allegedly threatening the victim.

The defendant was the subject of a delinquency petition filed on July 15, 1977, which alleged that he committed both the offenses of armed robbery and aggravated kidnapping. Subsequently the Will County States' Attorney filed a motion to remove the case from prosecution under the Juvenile Court Act pursuant to Ill.Rev.Stat.1977, ch. 37, par. 702–7, and to transfer the case to be prosecuted under the criminal law. After a hearing the trial court granted the State's motion to transfer. Thereafter the defendant was indicted for the offenses of armed robbery and aggravated kidnapping by a Will County grand jury. Following a jury trial, the defendant was acquitted of armed robbery but convicted of aggravated kidnapping. The court sentenced defendant to a term of imprisonment of from 4 years to 4 years and 1 day to be served in the Juvenile Division of the Illinois Department of Corrections.

On appeal the defendant claims that the statute permitting the transfer of juveniles to criminal court is unconstitutional in that it is vague and denies him procedural and substantive due process of law; that the trial court abused its discretion in transferring the defendant to adult criminal court; that he was denied his right to treatment and services under the Juvenile Court Act where the trial court failed to make a bona fide determination as to defendant's amenability to treatment as a juvenile and as to the availability of treatment facilities; and that the trial court erred in failing to give the defendant's tendered jury instruction on the defense of necessity.

The facts which resulted in defendant's conviction occurred in the late evening of July 13, 1977, and the following day. The victim, Robert Shook, was driving his car on to the entrance ramp to Interstate Route 80 near Joliet, Illinois, when 2 men walked out in front of his car. Shook reported that he applied the brakes and his car slid sideways and the next thing he knew guns were in his face. The two men got in his car and threatened him. He was told to start driving, and when he caught up to two of the men's friends down the road to pick them up. About fifty yards down the road he picked up the defendant, Will Cater, Jr., and another man. Thereafter the defendant drove at the order of one of his companions who had a gun. The victim Shook testified that the defendant had personally threatened him. While Cater was driving Shook who was then sitting in the back seat of the car, was robbed at gunpoint of his wallet containing $48 by one of the men with a gun. The defendant and his companions then forced Shook to accompany them to Nebraska where they left the vehicle. Shook then notified the police and the defendant and the other three men were arrested there.

[1] The first issue raised on appeal is whether the juvenile transfer statute (Ill. Rev.Stat.1977, ch. 37, par. 702–7) is unconstitutional as the defendant urges. The exact same issue was recently decided by the Illinois Supreme Court in *People v. Taylor* (1979), 76 Ill.2d 289, 29 Ill.Dec. 103, 391 N.E.2d 366. The Illinois Supreme Court in *Taylor* interpreted the juvenile transfer

statute,' as adopted by the legislature in response to the case of *Kent v. U. S.* (1966), 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84, as satisfying the constitutional requirements of due process. The *Taylor* opinion clearly recites the law on the multiple sub-issues argued by defendant Cater in claiming the statute here is unconstitutional. We adhere to the reasoning espoused in the *Taylor* opinion and conclude as the Supreme Court did that the transfer statute (Ill.Rev.Stat. 1977, ch. 37, par. 702–7) is constitutional.

[2] The defendant's second argument is that the trial court abused its discretion in transferring him from juvenile jurisdiction to allow prosecution as an adult. "The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached." (*People v. Taylor* (1979), 76 Ill.2d 289, 306, 29 Ill.Dec. 103, 110, 391 N.E.2d 366, 373, citing *Kent v. U. S.* (1966), 383 U.S. 541, 553, 86 S.Ct. 1045, 1053, 16 L.Ed.2d 84). The Illinois Juvenile Court Act provides 6 criteria to be considered by the juvenile court judge in making a determination on a motion to transfer the juvenile to be prosecuted under the criminal law.

"(1). [W]hether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; and (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority." (Ill.Rev.Stat.1977, ch. 37, par. 702–7(3)(a).

The defendant conceded the fact that there was sufficient evidence upon which a grand jury indictment could be expected to be returned. It is also self-evident and not contested that defendant Cater was 16½ years old when the alleged crime was committed. The remaining four criteria set forth in the statute as applied to the facts of the instant case are argued by the defendant to not support the decision to transfer defendant to adult criminal court.

[3, 4] According to the Illinois Supreme Court the role of the appellate court in determining the propriety of a transfer of a juvenile to be prosecuted as an adult is to determine whether, in invaluating the evidence presented at the hearing on the motion to transfer, in light of the aforementioned statutory criteria, the juvenile judge has abused his discretion. (*People v. Taylor* (1979), 76 Ill.2d 289, 29 Ill.Dec. 103, 391 N.E.2d 366). No formal statement of the juvenile judge's reasons for authorizing the transfer is necessary. All that is required is the preservation of a record which will allow a meaningful review of the juvenile judge's exercise of discretion. The record in the present case is sufficient for our meaningful review and supports a conclusion that the trial court did not abuse his discretion in the case at bar. The defendant's argument that the trial court gave more weight to some of the 6 statutory criteria rather than applying all 6 on an equal basis is unpersuasive. A simila. argument was expressly rejected in *Taylor*. The defendant strongly suggests that the trial court erred in ordering the transfer because here the defendant 1) had no prior history of delinquent behavior, 2) his participation in the offense was minimal, and 3) there was no bona fide attempt to determine the availability of juvenile facilities for defendant's treatment and rehabilitation. We disagree with defendant's arguments. The record of the transfer hearing supports the conclusion that defendant took an active part in the crime that occurred. He drove the car and the victim testified that defendant threatened him personally with harm. The offense charged was committed in an aggressive manner with utter disregard for the safety of the victim. The defendant's companions were armed and threatened to use the weapons on the victim. These facts support the court's findings.

The record of the transfer hearing further establishes through the testimony of Louis Stalzer, the probation officer of Will County, that no facilities for delinquent minors existed in Will County and that the Department of Corrections would better serve the needs of the defendant. This testimony was not rebutted and clearly refutes the defendant's allegation that no bona fide attempt was made by the court to determine whether any facilities were particularly available for the treatment of the defendant.

With regard the background of the defendant the State concedes that no evidence was presented at the transfer hearing which indicated that the defendant had any previous delinquent or criminal history. The defendant asserts on the basis of his presentence report that his past history of good conduct should have precluded the transfer.

[5, 6] The United States Supreme Court has addressed the question of the assignment of weights to the statutory criteria:

"Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case * * * for trial under adult procedures * * *." (*Kent v. United States* (1966), 383 U.S. 541, 567–68, 16 L.Ed.2d 84, 101, 86 S.Ct. 1045, 1060, 16 L.Ed.2d 84; *accord, People v. Taylor* (1979), 76 Ill.2d 289, 29 Ill.Dec. 103, 391 N.E.2d 366).

The transfer hearing is dispositional in nature. It does not determine the guilt or innocence of the minor but rather determines the forum in which guilt or innocence will be judged. The determinative standard to satisfy due process is fundamental fairness. Fundamental fairness does not require the juvenile judge to exercise his discretion with any degree of mathematical certainty. Not all of the factors set forth in the transfer statute need be resolved against the juvenile to justify a waiver of juvenile court jurisdiction. (*People v. Taylor* (1979), 76 Ill.2d 289, 29 Ill.Dec. 103, 391 N.E.2d 366). We agree with the holding in *Taylor*, "[t]hat under our [present] statute the State need only present evidence sufficient to persuade the trial court, in the sound exercise of its discretion, that in light of the statutorily prescribed criteria transfer is warranted." (76 Ill.2d at 303, 304, 29 Ill.Dec. at 109, 391 N.E.2d at 372). The record manifestly supports the trial judge's finding that it was not in the best interest of the minor and the public to proceed under the juvenile court act, but that the best interest of the minor and the security of the public required that the minor defendant continue in custody for a period extending beyond his minority. The trial court did not abuse its discretion in permitting the criminal prosecution in the present case.

[7] The third issue the defendant presents is:

> Whether the defendant was denied his rights to treatment and services under the juvenile court act where the trial court failed to make a bona fide determination as to the defendant's amenability to treatment as a juvenile and where the only evidence presented as to the availability of treatment facilities merely established that there were no facilities for delinquent juveniles in Will County.

The defendant contends that there is a strong presumption that minors are to be treated within the juvenile system and that a minor has a right to treatment under the juvenile court act. As the Supreme Court pointed out in *Taylor* such a presumption can be overcome by the juvenile judge's consideration of the 6 criteria set forth in the statute. (Ill.Rev.Stat.1977, ch. 37, par. 702–7). Our analysis of the trial court decision to transfer in deciding the preceding issue is also determinative of the similar argument regarding this issue. Contrary to defendant's argument, no one criteria is all determinative nor is application of equal weight to each and everyone of the 6 criteria required.

The last issue presented for review is whether the trial court erred in refusing to give defendant's tendered jury instruction

on the defense of necessity at the criminal trial. The defendant contends that there was sufficient evidence before the jury that he was without blame in occasioning or developing the situation, and that he reasonably believed his actions in cooperating in the kidnapping were necessary to avoid a greater injury to the victim than that which might result from his own conduct.

[8] It is well settled that the defendant is entitled to have the jury consider any legally recognized defense which is supported by some evidence in the record. (*People v. Unger* (1975), 33 Ill.App. 770, 338 N.E.2d 412). Cater's testimony, if believed, indicated that he was without blame in occasioning the situation. Some slight evidence was presented through defendant Cater's own self-serving testimony, that he personally feared co-defendant Eddie Grimes, who had a gun, and he further feared that his non-cooperation would cause Grimes to injure the victim, Robert Shook.

[9, 10] Despite the presence of some slight evidence on the defense of necessity the trial court correctly refused to give defendant's tendered jury instruction on that defense. The defense tendered non-Illinois Pattern Jury Instruction which provided:

"It is a defense to the charge made against the defendant, Will Cater, that his conduct which would otherwise be an offense, was justifiable by reason of necessity if he was without blame in occasioning or developing the situation and he reasonably believed his conduct was necessary to avoid an injury to Robert Shook greater than the injury which might reasonably result from his own conduct."

The tendered instruction is only a recitation of the statutory law in Illinois with respect to the defense of necessity. (Ill.Rev.Stat. 1977, ch. 38, par. 7–13). It does not attempt to apply the law it purports to state, to the facts of the case. In fact the form of the offered tendered instruction might mislead the jury as to the applicability of the necessity defense to the facts of the present case, considering that the jury was given the defendant's tendered instruction on the affirmative defense of compulsion. The major distinction between the defenses of compulsion and necessity is that in the former the source of the coercive power is from a human being and in the latter the coercive power has traditionally arisen from the forces of nature. In *People v. Lucas* (1969), 41 Ill.2d 370, 243 N.E.2d 228, a case factually similar to the case at bar, the trial court's refusal to give a tendered instruction on the defense of necessity was upheld because the instruction was defective. The defective instruction in *Lucas* also merely reiterated the statutory definition of the defense of necessity without applying it to the facts of the case. We believe the *Lucas* case is controlling and that the tendered instruction on the defense of necessity would have misled the jury and was patently defective.

For the reasons stated the judgment of the Circuit Court of Will County is affirmed.

Judgment affirmed.

STENGEL and SCOTT, JJ., concur.

78 Ill.App.3d 1031
34 Ill.Dec. 358

**PEOPLE of the State of Illinois,
Plaintiff-Appellee,**

v.

**Darnell HAMILTON,
Defendant-Appellant.**

No. 78-257.

Appellate Court of Illinois,
First District, Fourth Division.

Nov. 15, 1979.

Rehearing Denied Dec. 19, 1979.

Juvenile defendant was convicted in the Circuit Court, Cook County, William Cousins, Jr., J., of attempt robbery and attempt rape, and he appealed. The Appel-

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

Be it Remembered, That, to wit: On the 15th day of January, 1980 certain proceedings were had and orders made and entered of record by said Court, among which is the following, viz:

78-113

People of the State of Illinois,

Appellee

vs.

Will Cater, Jr.,

Appellant

Appeal From:
Will County
Hon. Charles P. Connor
W77 C 216

Now on this day this cause coming on for hearing upon the petition for a rehearing filed herein, and the Court having duly considered said petition, as well as the matters and things alleged in support thereof, and being now fully advised in the premises;

It is therefore ordered by the Court that said petition for a rehearing herein, be and the same is hereby overruled and denied and that said petitioner pay the costs and charges herein taxed.

RECEIVED
OFFICE OF THE State Appellate Defender
OTTAWA, ILLINOIS

APPENDIX C

ORDER OF ILLINOIS SUPREME COURT DENYING LEAVE TO APPEAL

53050 SAD-Ott.

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

March 27, 1980

State Appellate Defender
Third Judicial District
628 Columbus St., Suite 308
Ottawa, Illinois 61350

No. 53050 - People State of Illinois, respondent, vs. Will Cater, Jr., petitioner. Leave to appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clell L. Woods

Clerk of the Supreme Court

RECEIVED
MAR 2 [illegible] 1980
OFFICE OF THE STATE APPELLATE DEFENDER

APPENDIX D

NOTICES OF APPEAL TO U.S. SUPREME COURT

NO. 78-113

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

FILED

JUN 6 1980

THIRD DISTRICT
APPELLATE COURT CLERK

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- WILL CATER, JR. Defendant-Appellant.	Appeal from the CIrcuit Court of the Twelfth Judicial Circuit, Will County, Illinois HONORABLE Michael J. Orenic W77F1897J (Juvenile Proceedings) HONORABLE Charles P. Connor W77C216 (Adult Proceedings) Presiding Judges

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Will Cater, Jr., the appellant above-named, hereby appeals to the Supreme Court of the United States from a judgment of this Court affirming the appellant's conviction, entered herein on November 13, 1979. This Court entered an order denying appellant's petition for rehearing on January 15, 1980. The Illinois Supreme Court denied Leave to Appeal on March 27, 1980, and this notice is filed within ninety days of the latter date.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
628 Columbus Street
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR DEFENDANT-APPELLANT

NO. 78-113

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- WILL CATER, JR. Defendant-Appellant.	) Appeal from the Circuit Court for the Twelfth Judicial Circuit, Will County, Illinois) HONORABLE Michael J. Orenic W77F1897J (Juvenile Proceedings)) HONORABLE Charles P.Connor W77C216 (Adult Proceedings)) Presiding Judges

PROOF OF SERVICE

I, Robert Agostinelli, hereby certify that on the 5th day of June, 1980, I served copies of the attached Notice of Appeal to the Supreme Court of the United States on the attorneys and offices listed below, by depositing same in a United States Mailbox, with first class postage prepaid, in compliance with United States Supreme Court Rule 33 (1):

Edward Petka, State's Attorney,
Will County Courthouse, Joliet, Illinois 60431

William J. Scott, Attorney General,
188 West Randolph Street, Chicago, Illinois 60601

John X. Breslin, Appellate Assistance Service,
Box #654, Ottawa, Illinois 61350

The original of this document was filed this date in the Appellate Court of Illinois, Third Judicial District, Ottawa, Illinois.

Robert Agostinelli
ROBERT AGOSTINELLI
Deputy Defender

SUBSCRIBED AND SWORN TO BEFORE ME
this 4th day of June, 1980.

Notary Public

NO. 78-113

IN THE

CIRCUIT COURT OF WILL COUNTY, ILLINOIS

TWELFTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- WILL CATER, JR. Defendant-Appellant.	)	No. W77F1897J and W77C216

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Will Cater, Jr., the appellant above-named, hereby appeals to the Supreme Court of the United States from a judgment of the Appellate Court, Third Judicial District, affirming the appellant's conviction, entered herein on November 13, 1979. The Appellate Court entered an order denying appellant's petition for rehearing on January 15, 1980. The Illinois Supreme Court denied Leave to Appeal on March 27, 1980, and this notice is filed within ninety days of the latter date.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
628 Columbus Street
Ottawa, Illinois 61350
(815) 434-5531

COUNSEL FOR DEFENDANT-APPELLANT

NO. 78-113

IN THE

CIRCUIT COURT OF WILL COUNTY, ILLINOIS

TWELFTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
-vs-	)	W77F1897J and W77C216
WILL CATER, JR.	)	
Defendant-Appellant.	)	

PROOF OF SERVICE

I, Robert Agostinelli, hereby certify that on the 5th day of June, 1980, I served copies of the attached Notice of Appeal to the Supreme Court of the United States on the attorneys and offices listed below, by depositing same in a United States Mailbox, with first class postage prepaid, in compliance with United States Supreme Court Rule 33(1):

Edward Petka, State's Attorney,
Will County Courthouse, Joliet, Illinois 60431

William J. Scott, Attorney General,
188 West Randolph Street, Chicago, Illinois 60601

John X. Breslin, Appellate Assistance Service,
Box 554, Ottawa, Illinois 61350

The original of this document was filed this date in the Circuit Court of Will County, Illinois, Twelfth Judicial Circuit, Will County, Illinois.

Robert Agostinelli
ROBERT AGOSTINELLI
Deputy Defender

SUBSCRIBED AND SWORN TO BEFORE ME
this 4th day of June, 1980.

Notary Public

APPENDIX E

COPY OF ILLINOIS SUPREME COURT'S OPINION

IN PEOPLE V. TAYLOR, 76 Ill. 2d 289, 391 N.E. 2d 366 (1979)

rule that the use of affidavits or testimony to show "the motive, method or process by which the jury reached its verdict" was not permitted. 69 Ill.2d 507, 511, 14 Ill.Dec. 460, 462, 372 N.E.2d 656, 658.

United States v. Schroeder (8th Cir. 1970), 433 F.2d 846, *cert. denied* (1971), 401 U.S. 943, 91 S.Ct. 951, 28 L.Ed.2d 224, is also pertinent. There a juror signed an affidavit stating that he did not believe that the defendant was guilty and had voted for conviction against his will, although the juror had answered in the affirmative when polled on his guilty verdict. A claim that the verdict against the defendant was not unanimous was rejected by the court. It stated:

"After a jury has given its verdict, has been polled in open court and has been discharged, an individual juror's change of mind or claim that he was mistaken or unwilling in his assent to the verdict comes too late. Under the circumstances of this case, the verdict must stand unimpeached." (433 F.2d 846, 851.)

Cf. United States v. Johnson (5th Cir. 1974), 495 F.2d 1097, 1102–03.

[8] The defendant argues that this case does not involve an attempt to impeach a verdict, since there was no genuine verdict, Mrs. Goss not having "consented" to it. We do not find that argument persuasive. Mrs. Goss' statement did not refer to any "extraneous prejudicial information" or "outside influence" (*People v. Holmes* (1978), 69 Ill.2d 507, 516, 14 Ill.Dec. 460, 372 N.E.2d 656), unlike the case in *Holmes*. Apart from her account of the proceedings in open court when she was polled, Mrs. Goss' statement describes a process by which the verdict was reached, her motive for joining in it, and the motive underlying her response to the poll. As such the statement was inadmissible under the rule stated in *Holmes* and in other decisions dealing with this subject. *Smith v. Eames* (1841), 4 Ill. (3 Scam.) 76, 81; *People v. Tobe* (1971), 49 Ill.2d 538, 276 N.E.2d 294; *United States ex rel. Tobe v. Bensinger* (7th Cir. 1974), 492 F.2d 232; *cf. People v. Spice* (1977), 54 Ill.App.3d 539, 12 Ill.Dec. 506, 370 N.E.2d 129.

For the reasons given above, the judgment of the appellate court is affirmed.

Judgment affirmed.



76 Ill.2d 289
29 Ill.Dec. 103

The PEOPLE of the State of Illinois, Appellee,

v.

James E. TAYLOR, Appellant.

No. 50913.

Supreme Court of Illinois.

June 8, 1979.

Defendant was convicted in the Circuit Court, Winnebago County, John S. Ghent, J., of burglary, armed robbery, and rape, and he appealed. The Appellate Court, Second District, Guild, J., 61 Ill.App.3d 37, 18 Ill.Dec. 353, 377 N.E.2d 838, reversed and remanded. After allowing defendant leave to appeal, the Supreme Court, Underwood, J., held that: (1) where judge stated reasons for ordering transfer from juvenile court to criminal court, defendant could not claim he was denied due process by virtue of fact that statute did not require judge to state reasons for ordering transfer; (2) as transfer hearing was not adjudicatory, procedural safeguards required at criminal trials and adjudications of delinquency were not mandated by due process; (3) use of documentary or testimonial evidence of reliable nature, even though hearsay, at transfer hearing was not constitutionally impermissible; (4) it was not constitutionally required to prescribe mathematical formula to govern judge's discretion in considering criteria for transfer from juvenile to criminal court; (5) right of interlocutory appeal from transfer order was not constitutionally compelled; (6) evidence was not insuffi-

cient to support armed robbery conviction; (7) defendant's age when sentenced was relevant criterion in determining whether he should have been committed to juvenile division of State Department of Corrections, and (8) State did not sustain heavy burden of proving that defendant knowingly and intelligently waived previously invoked right to counsel for purpose of determining admissibility of confession.

Affirmed.

1. Constitutional Law ⇐48(4)

On appeal from convictions for burglary, armed robbery and rape challenging statute governing transfer from juvenile to criminal court, evidence that legislature expressly followed Supreme Court's guidelines in drafting transfer statute reinforced normal presumption of constitutionality which attached to all statutes. S.H.A. ch. 37, § 702-7(3).

2. Constitutional Law ⇐255(4)

Where judge stated reasons for transfer of defendant from juvenile to criminal court, defendant could not claim he was denied due process by reason of fact that transfer statute did not require judge to state his reasons for ordering transfer. S.H.A. ch. 37, § 702-7(3); U.S.C.A.Const. Amend. 14.

3. Criminal Law ⇐1148

On appeal following transfer from juvenile to criminal court, role of appellate court is to determine whether, in evaluating evidence in light of statutory criteria, juvenile judge abused his discretion. S.H.A. ch. 37, § 702-7(3).

4. Infants ⇐68.7(4)

Although no formal statement of reasons or conventional findings of fact are necessary for transfer of defendant from juvenile to criminal court, juvenile judge must take care to preserve record sufficiently explicit so that exercise of discretion may be reviewed meaningfully. S.H.A. ch. 37, § 702-7(3).

5. Constitutional Law ⇐255(4)

Standard for determining what due process requires in any juvenile proceeding is fundamental fairness. U.S.C.A.Const. Amend. 14.

6. Infants ⇐68.7(1)

Sole purpose of hearing for transfer from juvenile to criminal court is to determine whether best interests of the child and of society would be served by retention of juvenile court authority over him or whether juvenile, under all the circumstances, should be transferred to be tried as an adult. S.H.A. ch. 37, § 702-7(3).

7. Infants ⇐68.7(2)

Purpose of statute governing transfer from juvenile to criminal court may best be effectuated by sound exercise of juvenile court judge's discretion at informal hearing, limited by general requirements of due process and fair treatment, but not governed by strict rules of procedure and evidence applicable at either criminal trial or at juvenile court delinquency hearing. S.H.A. ch. 37, § 702-7(3); U.S.C.A.Const. Amend. 14.

8. Constitutional Law ⇐255(4)
Infants ⇐68.7(1)

As hearing for transfer from juvenile to criminal court is not adjudicatory, procedural safeguards required at criminal trials and adjudications of delinquency are not mandated by due process. S.H.A. ch. 37, § 702-7(3); U.S.C.A.Const. Amend. 14.

9. Infants ⇐68.7(3)

Under statute governing transfer from juvenile to criminal court, State need only present evidence sufficient to persuade trial court, in sound exercise of its discretion, that in light of statutorily prescribed criteria transfer is warranted. S.H.A. ch. 37, § 702-7(3).

10. Infants ⇐68.7(3)

Use of documentary or testimonial evidence of reliable nature, even though hearsay, constitutes much less time-consuming method of proof very nearly essential to hearing on transfer from juvenile to criminal court, and thus its use of such evidence

in transfer hearing is not constitutionally impermissible. S.H.A. ch. 37, § 702-7(3); U.S.C.A.Const. Amend. 14.

11. Infants ⇐68.7(3)

All of relevant factors under statute governing transfer from juvenile to criminal court need not be resolved against juvenile in order to justify waiver of juvenile court jurisdiction; there was no utility in requiring court to make arithmetic type calculation as to weight given to each factor nor was it constitutionally required to prescribe mathematical formula to govern judge's discretion. S.H.A. ch. 37, § 702-7(3).

12. Infants ⇐68.8

Right of interlocutory appeal following order transferring defendant from juvenile to criminal court was not constitutionally compelled. S.H.A. ch. 37, § 702-7(3).

13. Constitutional Law ⇐251.6, 316

If party is threatened with loss of important rights, procedural due process ordinarily requires meaningful opportunity to be heard, not a right to immediate appeal before decision is implemented. U.S.C.A. Const. Amend. 14.

14. Infants ⇐16.2

Delay of juvenile proceedings beyond 17th birthday does not preclude their use for conduct occurring prior to 17th birthday so long as juvenile is still under age of 21. S.H.A. ch. 37, §§ 701-13, 702-2, 704-1, 705-1 to 705-7.

15. Criminal Law ⇐193

If appellate court reverses criminal conviction and remands for new trial without deciding defendant's contention that evidence at first trial was insufficient, court risks subjecting defendant to double jeopardy. U.S.C.A.Const. Amend. 5.

16. Robbery ⇐24.1(3)

Evidence in prosecution was not insufficient to support armed robbery conviction.

17. Infants ⇐69

Policy of statute requiring offenders under 17 years of age sentenced to imprisonment to be committed to juvenile division of State Department of Corrections was to protect offender who was under 17 from hardening influence and possible abuse from fellow inmates in adult penitentiary system and to protect those committed to juvenile division from being preyed upon by inmates over 17; thus, offender's age when sentenced was the relevant criterion for determining commitment to juvenile division. S.H.A. ch. 38, § 1005-8-6(c).

18. Criminal Law ⇐531(3)

In prosecution for armed robbery and rape, State did not sustain heavy burden of proving that defendant knowingly and intelligently waived previously invoked right to counsel for purposes of determining admissibility of confession.

Ralph Ruebner, Deputy State App. Defender, Chicago, Michael Mulder, Asst. State App. Defender, and Mary Robinson, Deputy State App. Defender, Elgin, for appellant.

William J. Scott, Atty. Gen., Springfield (Donald B. Mackay, Melbourne A. Noel, Jr., and Gerri Papushkewych, Asst. Attys. Gen., and William L. Browers, of State's Attys. App. Service Commission, Elgin, of counsel), for the People.

UNDERWOOD, Justice:

On December 9, 1976, defendant, James Earl Taylor, was convicted in a bench trial of burglary, armed robbery and rape, and was sentenced to concurrent terms of 6 to 18 years for the two latter offenses. Defendant was 16 years old when the crimes were committed and 17 at the time of trial. On August 12, 1976, before defendant's criminal trial, the circuit court of Winnebago County had held a transfer hearing pursuant to section 2-7(3) of the Juvenile Court Act (Ill.Rev.Stat.1975, ch. 37, par. 702-7(3)) and at its conclusion had ordered that defendant be tried as an adult for the crimes charged. On appeal, defendant argued that the statute permitting transfer of juveniles to criminal court was unconstitutional in that it denied juveniles due process

of law; that the trial court should have suppressed a confession defendant gave police; and that the evidence at defendant's trial had been insufficient to prove his guilt beyond a reasonable doubt. The appellate court found the transfer statute constitutional, but agreed with defendant that his confession should have been suppressed. That court therefore reversed and remanded, finding no need to consider whether the evidence at trial had been sufficient to support defendant's conviction. (61 Ill.App.3d 37, 18 Ill.Dec. 353, 377 N.E.2d 838.) We allowed defendant leave to appeal.

At trial the complaining witness, a 70-year-old woman who lived alone, testified that one night in late July 1976 an intruder broke into her home by removing the dining room window screen. She heard a noise and, turning, saw a black man sitting in the window. When she ran to the front door screaming, the man stopped her, pulled a knife and threatened to kill her if she screamed again. He then tied her hands, covered her head and raped her. Next he made her get her purse and went through it while sitting on top of her. The last time she knew, several months earlier, the purse had contained $2,000 and she never took it out of the house. After the intruder left, the money was missing. The witness could not identify defendant, but the dining room window screen, found outside the home, had defendant's fingerprint on it.

Defendant was arrested at 9:30 on the morning of July 30, 1976. He was given incomplete *Miranda* warnings and questioned. When defendant asked to talk to an attorney, he was allowed to place a call and, receiving no answer, leave a message. Questioning continued. The attorney returned defendant's call and refused to take the case. Defendant told police "he would rather have Mr. Olson but he didn't know who to get now"; he was upset and crying. Questioning nevertheless continued, and defendant gave a signed statement at 3 p. m., admitting that he went to the victim's house with another man, but stating that he ran away when the other entered. At 10:45 that night defendant gave another signed statement, admitting the burglary and armed robbery but denying the rape. At sometime during the giving of this statement defendant asked whether he should have an attorney and was told that it was up to him. At 10:30 the following morning defendant was given full *Miranda* warnings and he signed a waiver form. The officers present testified that he made no specific request for an attorney. He thereafter gave an oral statement admitting the rape as well as the other offenses. The trial court held the first two confessions inadmissible because police elicited them after defendant had requested an attorney. The court held the third confession admissible, however, because defendant had validly waived his right to counsel. The appellate court reversed, holding that the State had not met its "heavy burden" of showing that defendant had waived his previously invoked right to counsel. 61 Ill.App.3d 37, 44, 18 Ill.Dec. 353, 377 N.E.2d 838.

Section 2–7 of the Juvenile Court Act (Ill.Rev.Stat.1975, ch. 37, par. 702–7(3)) provides:

"(3) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, and, on motion of the State's Attorney, a Juvenile Judge, designated by the Chief Judge of the Circuit to hear and determine such motions, after investigation and hearing but before commencement of the adjudicatory hearing, finds that it is not in the best interests of the minor or of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.

(a) In making its determination on a motion to permit prosecution under the criminal laws, the court shall consider among other matters: (1) whether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities

particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; and (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority. The rules of evidence shall be the same as under Section 5–1 of this Act."

Defendant argues that the statute denies juveniles due process in that (1) the judge is not required to state his reasons for ordering the transfer; (2) no standard of proof is articulated; (3) the relaxed rules of evidence used at dispositional hearings are prescribed; (4) the judge is not required to weigh the specified criteria according to a set formula; (5) the juvenile may not appeal a transfer order until after his trial. In sum, defendant contends that the statute does not adequately safeguard the juvenile's rights at a critically important stage of the proceedings against him because it does not sufficiently circumscribe the untrammeled and potentially arbitrary discretion of the judge.

We do not agree that the statute is constitutionally deficient. The starting point for any due process analysis of juvenile transfer statutes is *Kent v. United States* (1966), 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84. Interpreting the requirement of "full investigation" in the District of Columbia Juvenile Court Act, and recognizing the "critically important" nature of the transfer proceedings to the juvenile, the Supreme Court there held that certain procedural safeguards must attend a decision to transfer:

"[W]e conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." (383 U.S. 541, 557, 86 S.Ct. 1045, 1055, 16 L.Ed.2d 84, 95.)

Although the *Kent* decision rests primarily on statutory construction, the suggestion that the safeguards outlined there were guaranteed by due process was reinforced by a subsequent reference to *Kent* in *In re Gault* (1967), 387 U.S. 1, 30, 87 S.Ct. 1428, 1445, 18 L.Ed.2d 527, 547–48. As the United States Court of Appeals for the Fourth Circuit has said:

"Whether *Gault* and *Kent*, taken together, form a constitutional imperative as to juvenile waiver proceedings is not self-evident. However, *Kent* and *Gault* do make it unquestionably clear that juvenile court proceedings that affect a young person's substantial rights 'must measure up to the essentials of due process and fair treatment' [*In re Gault* (1967), 387 U.S. 1, 30, 87 S.Ct. 1428, 1445, 18 L.Ed.2d 527, 548]." *Kemplen v. Maryland* (4th Cir. 1970), 428 F.2d 169, 173.

See *In re Beasley* (1977), 66 Ill.2d 385, 391, 6 Ill.Dec. 202, 362 N.E.2d 1024.

[1] The statute challenged here became effective on October 1, 1973. Under prior law, transfer of juveniles to criminal court had been largely a matter of prosecutorial discretion. (Ill.Rev.Stat.1971, ch. 37, par. 702–7(3); *People v. Sprinkle* (1974), 56 Ill.2d 257, 307 N.E.2d 161.) Unlike the prior law, the present statute closely parallels the District of Columbia transfer statute as interpreted by the Supreme Court in *Kent*. Indeed the council commentary to the new provision indicates that the statute was amended in response to the *Kent* decision. (Ill.Ann.Stat., ch. 37, par. 702–7, Council Commentary, at 81 (Smith-Hurd Supp. 1979).) The six criteria that the statute sets out for the judge to consider closely follow the District of Columbia criteria set out in an appendix to the *Kent* opinion. (383 U.S. 541, 566, 86 S.Ct. 1045, 1060, 16 L.Ed.2d 84, 100.) Again the council commentary notes that, although prior law had not specified such standards, "[c]riteria for transfer suggested by the *Kent* case are now listed in the section." (Ill.Ann.Stat., ch. 37, par. 702–7, Council Commentary, at

81 (Smith-Hurd Supp.1979).) We think that the evidence that the legislature expressly followed the Supreme Court's guidelines in drafting the present transfer statute reinforces the normal presumption of constitutionality that attaches to all statutes. We note that the only court to consider the constitutionality of this statute rejected a claim that the statutory standards were too ambiguous, holding that they were "specific enough to satisfy due process." *United States ex rel. Pedrosa v. Sielaf* (N.D.Ill. 1977), 434 F.Supp. 493, 497.

[2] Turning to defendant's specific arguments, we believe he may not properly claim that he was denied due process because the statute does not require the judge to state his reasons for ordering a transfer; here the judge did state his reasons. The judge found sufficient evidence for a grand jury to return an indictment for the crimes charged, as well as evidence that the crimes were committed in an aggressive, premeditated and violent manner. He further took judicial notice of the juvenile court file showing that defendant had an extensive prior history of delinquency. Finally, he found, based on expert testimony, that there were no juvenile facilities available for dealing adequately with one in defendant's situation and that transfer was in the best interests of defendant and the People. We nonetheless comment on defendant's argument.

[3, 4] The Supreme Court in *Kent* held that the juvenile court must "accompany its waiver order with a statement of the reasons or considerations therefor * * * with sufficient specificity to permit meaningful review." (383 U.S. 541, 561, 86 S.Ct. 1045, 1057, 16 L.Ed.2d 84, 97.) The court indicated, however:

> "We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact." (383 U.S. 541, 561, 86 S.Ct. 1045, 1057, 16 L.Ed.2d 84, 97.)

According to our interpretation of the Illinois transfer statute, the role of the appellate court is to determine whether, in evaluating the evidence in light of the statutory criteria, the juvenile judge has abused his discretion. (*People v. Underwood* (1977), 50 Ill.App.3d 908, 8 Ill.Dec. 908, 365 N.E.2d 1370.) Therefore, while no formal statement of reasons or conventional findings of fact are necessary, the juvenile judge must take care to preserve a record sufficiently explicit so that his exercise of discretion may be reviewed meaningfully. The trial judge in the present case made findings of fact, and the council commentary appears to favor a formal statement of reasons. Neither the statute nor *Kent*, however, precludes more informal means of preserving a record sufficiently adequate to ensure meaningful review. We note that other courts considering this issue have reached the same conclusion. The Supreme Court of Montana has said:

> "We do not construe the provisions of the Montana Juvenile Court Act as requiring conventional findings of fact or an express, formal statement of the reasons for ordering the waiver and transfer. If the reasons motivating the exercise of the juvenile court's discretion in ordering the waiver and transfer sufficiently appear in the record of the hearing to permit meaningful appellate review of the discretion exercised, constitutional requirements are satisfied." *Lujan v. District Court* (1973), 161 Mont. 287, 295, 505 P.2d 896, 900–01.

See also *In re Welfare of I. Q. S.* (1976), 309 Minn. 78, 86, 244 N.W.2d 30, 38; *Lewis v. State* (1970), 86 Nev. 889, 894, 478 P.2d 168, 171.

We consider next defendant's contention that the statute denied him due process by failing to articulate a standard of proof, by prescribing for transfer hearings the relaxed rules of evidence used at dispositional hearings, and by failing to specify a formula according to which the judge must weigh the six criteria that the statute lists for his consideration. The statute provides that "[t]he rules of evidence shall be the same as under Section 5–1 of this Act" (Ill.Rev.Stat. 1975, ch. 37, par. 702–7(3)(a)), and the council commentary refers, albeit with a typo-

graphical error, to the same section for the standard of proof. Section 5–1(1) provides:

"After adjudging the minor a ward of the court, the court shall hear evidence on the question of the proper disposition best serving the interests of the minor and the public. All evidence helpful in determining this question, including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purposes of the adjudicatory hearing. * * *" (Ill.Rev.Stat.1975, ch. 37, par. 705–1(1).)

Defendant contends that in order to comport with due process requirements the statute must render hearsay inadmissible and provide that the State prove by "clear and convincing evidence" that transfer would be in the best interests of the minor and the public. We do not agree.

[5–7] The standard for determining what due process requires in any juvenile proceeding is "fundamental fairness." (*McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543, 29 L.Ed.2d 647, 659, 91 S.Ct. 1976, 1985.) To determine what specific procedural safeguards fundamental fairness requires in the context of a particular proceeding, one must understand the nature of the proceeding. The salient feature of the transfer hearing challenged here is that it is not adjudicatory in nature. Regardless of the importance of such a hearing to the juvenile, it does not determine guilt or innocence. Rather, as the statute recognizes, the hearing is dispositional in nature, determining the forum in which guilt or innocence is to be adjudicated. As the Supreme Court of Washington has said:

"In determining whether the essentials of due process and fair treatment were provided in the instant case, it is important to keep in mind the exact nature of a juvenile court transfer hearing. Such a hearing does not result in a determination of delinquency * * *; does not result in a determination of guilt as may a criminal trial; and does not directly result in confinement or other punishment as may both a delinquency hearing and a criminal proceeding. In short, the transfer hearing is not an adversary proceeding. Rather, the sole purpose of the transfer hearing, as we have recently said, is to determine 'whether best interests of the child and of society would be served by the retention of the juvenile court authority over him or whether the juvenile, under all the circumstances, should be transferred to be tried as an adult.' [Citation.] We believe that this purpose may best be effectuated by the sound exercise of the juvenile court judge's discretion at an informal hearing, limited of course by the general requirements of due process and fair treatment, but not governed by the strict rules of procedure and evidence applicable at either a criminal trial or at a juvenile court delinquency hearing." *State v. Piche* (1968), 74 Wash.2d 9, 14, 442 P.2d 632, 635–36, *cert. denied* (1969), 393 U.S. 1041, 21 L.Ed.2d 588, 89 S.Ct. 666.

See also *Clemons v. State* (1974), 162 Ind. App. 50, 58–60, 317 N.E.2d 859, 864–65; *State v. Carmichael* (1973), 35 Ohio St.2d 1, 298 N.E.2d 568; *In re Murphy* (1972), 15 Md.App. 434, 291 A.2d 867.

[8, 9] We agree with the Supreme Court of Washington. The transfer hearing not being adjudicatory, the procedural safeguards required at criminal trials and adjudications of delinquency are not mandated by due process. We hold that under our statute the State need only present evidence sufficient to persuade the trial court, in the sound exercise of its discretion, that in light of the statutorily prescribed criteria transfer is warranted.

As regards the standard of proof, we note that the Uniform Juvenile Court Act suggests only a probable cause standard:

"[T]he court * * * may transfer the offense for prosecution to the appropriate court having jurisdiction of the offense if: * * * (4) the court finds that there are reasonable grounds to believe that (i) the child committed the delinquent act alleged; (ii) the child is not amenable to treatment or rehabilitation as a juvenile through available facilities; (iii) the child

is not committable to an institution for the mentally retarded or mentally ill; and (iv) the interests of the community require that the child be placed under legal restraint or discipline." (9 Uniform Laws Annotated, Uniform Juvenile Court Act, sec. 34(a)(4), at 429 (master ed. 1973).)

Although evidence of the juvenile's guilt is among the statutory criteria, it is apparent that the greater the evidence of guilt required to be submitted by the State, the greater the likelihood of double jeopardy problems with the subsequent trial. See *Breed v. Jones* (1975), 421 U.S. 519, 541, 95 S.Ct. 1779, 1791, 44 L.Ed.2d 346, 362.

[10] The admission of social records containing hearsay is inherent in the nature of a dispositional hearing. The Supreme Court of Wisconsin quoted with approval the following characterization of a Federal District Court:

"Unlike a typical criminal action, a juvenile waiver proceeding vests the judge with a wide amount of discretion in making his determination. In his decision making, the juvenile judge does not simply deal with a specific factual incident in the accused's life as does a criminal court judge, but rather the juvenile judge must consider the juvenile's past, his future, his mind, and his acts and then balance these factors against the safety, needs, and demands of society." (*In re F. R. W.* (1973), 61 Wis.2d 193, 210, 212 N.W.2d 130, 139, quoting *Miller v. Quatsoe* (E.D.Wis.1971), 332 F.Supp. 1269, 1275.)

The use of documentary or testimonial evidence of a reliable nature, even though hearsay, constitutes a much less time-consuming method of proof very nearly essential to this type of hearing. Its use in that context is not, in our judgment, constitutionally impermissible.

[11] Finally, as regards assignment of weights to the statutory criteria, we note that the appendix to the *Kent* opinion comments as follows on the criteria listed there, on which the Illinois criteria are modeled:

"Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U. S. District Court for the District of Columbia for trial under the adult procedures of that Court." (*Kent v. United States* (1966), 383 U.S. 541, 567–68, 86 S.Ct. 1045, 1060, 16 L.Ed.2d 84, 101.)

We believe it is not constitutionally required and would not be feasible for the statute to prescribe a mathematical formula to govern the judge's discretion. As the Maryland court of special appeals said of a similar constitutional challenge:

"Of course, not all of the relevant factors under Section 70–16 need be resolved against the juvenile to justify the waiver of jurisdiction. Nor is there any utility in requiring the court to make an arithmetic-type calculation as to the weight given by it to each factor." *Hazell v. State* (1971), 12 Md.App. 144, 155, 277 A.2d 639, 645.

The United States Supreme Court has recognized the constitutionality of the judicial discretion and lack of formal procedure inherent in the juvenile transfer proceeding. In *Kent* the court observed of the statute that it upheld:

"The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached." (383 U.S. 541, 553, 86 S.Ct. 1045, 1053, 16 L.Ed.2d 84, 93.

Later in its opinion, after holding that a hearing was required for juvenile transfer, the court explained:

"We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment." (383 U.S. 541, 562, 86 S.Ct. 1045, 1057, 16 L.Ed.2d 84, 97–98.)

Subsequently, in *Breed v. Jones* (1975), 421 U.S. 519, 537, 95 S.Ct. 1779, 1790, 44 L.Ed.2d 346, 360, the court noted:

"However, the Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court. We require only that, whatever the relevant criteria, and whatever the evidence demanded, a State determine whether it wants to treat a juvenile within the juvenile-court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty, rather than subject him to the expense, delay, strain, and embarrassment of two such proceedings."

These observations not only indicate that the procedures urged by defendant are not constitutionally compelled, but also suggest that they are not desirable. The end result of excluding hearsay and placing a burden of clear and convincing evidence on the State would be to make the proceedings more formal and adversarial, thus increasing the expense, delay, strain and embarrassment that that are the warning signs of double jeopardy problems. We think the best general answer to defendant's position is the Supreme Court's comment in *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 551, 91 S.Ct. 1976, 1989, 29 L.Ed.2d 647, 664:

"If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it."

[12, 13] We consider next defendant's argument that he was denied due process because he was not permitted to appeal the transfer order until after his trial. We see no reason to believe that a right of interlocutory appeal is constitutionally compelled here, and defendant has cited no authority that so holds. We note that the District of Columbia statute upheld in *Kent* had no such provision. (D.C.Code sec. 11–914 (1961), cited in *Kent v. United States*, 383 U.S. 541, 547–48 & n. 6, 86 S.Ct. 1045, 1050 & n. 6, 16 L.Ed.2d 84, 90 & n. 6.) Moreover, when a party is threatened with a loss of important rights, procedural due process ordinarily requires a meaningful opportunity to be heard, but not a right to immediate appeal before the decision is implemented. (See, *e. g., Morrissey v. Brewer* (1972), 408 U.S. 471, 489, 92 S.Ct. 2593, 2609, 33 L.Ed.2d 484, 499, and *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 782, 93 S.Ct. 1756, 1759–60, 36 L.Ed.2d 656, 661–62 (loss of liberty); *Wolff v. McDonnell* (1974), 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (loss of good-time credits); *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (loss of welfare benefits).) Furthermore, as regards the wisdom of allowing such an appeal, we intimated in *People v. Martin* (1977), 67 Ill.2d 462, 10 Ill.Dec. 563, 367 N.E.2d 1329, that, if called upon to do so, we would reaffirm our holding in *People v. Jiles* (1969), 43 Ill.2d 145, 251 N.E.2d 529. In *Jiles*, we held that under the predecessor provision of section 2–7 the juvenile had no right to an interlocutory appeal from a transfer order, noting, "To permit interlocutory review would subordinate [the issue of guilt or innocence] and defer its consideration while the question of the punishment appropriate for a suspect whose guilt has not yet been ascertained is being litigated in reviewing courts." (43 Ill.2d 145, 150, 251 N.E.2d 529, 531.) The evils of delay—failing memories of witnesses, as well as their increasing unavailability—seriously jeopardize the prospect of a just disposition as this court observed in *Jiles*. 43 Ill.2d 145, 150, 251 N.E.2d 529.

[14] Defendant nonetheless argues that a more serious consequence of delay exists here in that delaying a determination of the propriety of the transfer order until the appeal from a criminal conviction denies him the benefits of treatment as a juvenile. That argument overstates the fact. Defendant cites no authority holding that his attainment of his 17th birthday precludes subsequent treatment as a juvenile for conduct occurring prior to his becoming 17. Section 1–13 of our Juvenile Court Act (Ill. Rev.Stat.1975, ch. 37, par. 701–13) defines "minor" as "a person under the age of 21

years * * *," and section 2–2 (Ill.Rev. Stat.1975, ch. 37, par. 702–2) defines a delinquent as "any minor who prior to his 17th birthday has violated or attempted to violate * * * any federal or state law or municipal ordinance." Subsequent sections dealing with the initiation and disposition of delinquency proceedings (Ill.Rev.Stat. 1975, ch. 37, pars. 704–1, 705–1 through 705–7) speak of "minors" or "minors under this Act," and it seems apparent that delay of juvenile proceedings beyond the 17th birthday does not preclude their use for conduct occurring prior to the 17th birthday so long as the juvenile is still under 21. True, some types of disposition available at 16 may not be available at 18 (see, *e. g.*, Ill.Rev.Stat.1975, ch. 37, par. 705–2), but even the interlocutory appeal sought by defendant might well involve that result. This seems particularly pertinent when one considers that, broadly speaking, our cases tend to demonstrate that, as here, it is the older juveniles who are likely to be transferred and prosecuted criminally.

[15, 16] The appellate court did not reach the question whether the evidence adduced at trial was sufficient to sustain defendant's conviction for armed robbery. We agree with defendant that this was error. When an appellate court reverses a criminal conviction and remands the case for a new trial without deciding defendant's contention that the evidence at the first trial was insufficient, we believe that the court risks subjecting the defendant to double jeopardy. The United States Supreme Court has held:

> "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." (*Burks v. United States* (1978), 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1, 9.

We do not agree, however, that the evidence here was insufficient to support the armed robbery conviction, as defendant argues. Although the complaining witness testified that she had not checked the zipper part of her purse, where she kept the $2,000, for two or three months, she also testified that she lived alone and never took the purse out of the house. Our holding in no way implies, of course, as the State suggests, that we have made a finding as to defendant's guilt that would be binding on the court on retrial.

[17] Defendant's final argument is that because he was 16 years old when the crimes for which he was sentenced were committed, he should have been sentenced to the Juvenile Division of the Department of Corrections rather than the Adult Division. Section 5–8–6(c) of the Unified Code of Corrections (Ill.Rev.Stat.1975, ch. 38, par. 1005–8–6(c)) provides:

> "All offenders under 17 years of age sentenced to imprisonment shall be committed to the Juvenile Division of the Department of Corrections * * *."

Defendant would have us interpret this as "all persons under 17 years of age *at the time they commit an offense for which they are subsequently* sentenced to imprisonment * * *." Although we agree that the statute is not entirely explicit, we find this construction tortured. It is much more natural to interpret the statute as "all offenders under 17 years of age *when* sentenced to imprisonment * * *." (See *People v. Walker* (1978), 61 Ill.App.3d 891, 897, 19 Ill.Dec. 106, 378 N.E.2d 607.) The policy of the statute appears to be twofold: to protect the offender who is under 17 from the hardening influence and possible abuse from fellow inmates in the adult penitentiary system and to protect those committed to the Juvenile Division from being preyed on by inmates over 17. The offender's age when sentenced is therefore the relevant criterion.

[18] The State argues that the appellate court erred in holding that the trial court should have suppressed defendant's third confession as well as the two prior ones. Our review of the record convinces us that the appellate court correctly held that the State had not sustained its "heavy burden" of proving that defendant knowingly and

intelligently waived his previously invoked right to counsel.

In accordance with the above reasoning, the judgment of the appellate court is affirmed.

Judgment affirmed.



76 Ill.2d 263
29 Ill.Dec. 113

The PEOPLE of the State of Illinois, Appellant,

v.

Donald PANUS, Appellee.

No. 51181.

Supreme Court of Illinois.

June 8, 1979.

Defendant was convicted in Circuit Court, Peoria County, Charles M. Wilson, J., of burglary, and he appealed. The Appellate Court for the Third District, 62 Ill. App.3d 177, 19 Ill.Dec. 655, 379 N.E.2d 319, reversed and remanded, and State's petition for leave to appeal was allowed. The Supreme Court, Kluczynski, J., held that: (1) if stolen property is positively identified by victim, trial court may admit it in evidence if it determines that it is relevant, and failure to identify the property by way of its serial number is not fatal, and (2) even if identification testimony of victim in burglary prosecution was insufficient to establish that tiller was his because victim was unable to identify any characteristics that were peculiar to his tiller stolen in the burglary, there was no abuse of discretion in admitting tiller into evidence where circumstances sufficiently showed that the tiller was connected with the crime and defendant, in light of evidence from another witness that defendant took a tiller from victim's premises and sold it to a third party, and tiller introduced at trial was the one sold to third party.

Appellate court reversed; circuit court affirmed.

1. Burglary ⇐2

Proof that specifically identifiable property was taken from burglarized premises is not an essential element of the offense of burglary. S.H.A. ch. 38, § 19–1(a).

2. Burglary ⇐42(1)

Recent unexplained possession of property stolen in a burglary may be relied on by trier of fact to infer guilt; such possession is relevant in determining whether it was defendant who entered burglarized premises and whether he did so with intent to commit theft therein. S.H.A. ch. 38, § 19–1(a).

3. Criminal Law ⇐404(4)

If stolen property is positively identified by victim, trial court may admit it in evidence if it determines that it is relevant, and failure to identify the property by way of its serial number is not fatal.

4. Criminal Law ⇐404(4)

Even if identification testimony of victim in burglary prosecution was insufficient to establish that tiller was his because victim was unable to identify any characteristics that were peculiar to his tiller stolen in the burglary, there was no abuse of discretion in admitting tiller into evidence where circumstances sufficiently showed that the tiller was connected with the crime and defendant, in light of evidence from another witness that defendant took a tiller from victim's premises and sold it to a third party, and tiller introduced at trial was the one sold to third party.

5. Burglary ⇐42(1)

Considering the character of the property, salability, and ease with which it is transported, there was no abuse of discretion in determining that defendant's possession of tiller identified as having been taken in burglary would be probative of whether defendant committed the burglary, though the time between the burglary and time tiller was shown to be in defendant's pos-

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. _____

WILL CATER, JR., Appellant

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Appellant, Will Cater, Jr., by and through his counsel Robert Agostinelli, Deputy Defender, Office of the State Appellate Defender, Third Judicial District, requests leave to file the attached Jurisdictional Statement without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Appellant's Affidavit in Support of this Motion is attached hereto.

Robert Agostinelli

ROBERT AGOSTINELLI
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
628 Columbus Street - Suite 308
Ottawa, Illinois 61350
(815) 434-5531

SUBSCRIBED AND SWORN TO
Before me this 19th day
of June, 1980.

Paula J. Fraser
NOTARY PUBLIC

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. _____

WILL CATER, JR., APPELLANT

-VS-

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

A F F I D A V I T

I, Will Cater, Jr., being first duly sworn according to law, deposes and says, in support of my Motion for Leave to Proceed without being required to prepay costs and fees:

1. I am the Petitioner in the above-entitled cause.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said cause.

5. That I have been released from physical custody and from parole by the Illinois Department of Corrections. I am currently living in Xenia, Ohio and attending my second year of college.

6. The nature of said cause is briefly stated as follows:

I was convicted of the offense of aggravated kidnapping following a jury trial in the Circuit Court of Will County, Illinois. I had previously been transferred from the Illinois juvenile court system to the adult criminal court. The Illinois Appellate Court, Third Judicial District, affirmed the judgment of the Circuit Court, ruling in part that the Illinois Juvenile Transfer Statute did not violate the due process clause of the Fourteenth Amendment to the United States. The Illinois Supreme Court refused to review my case.

It is my contention that the Illinois Juvenile Transfer Statute as interpreted by the Illinois Supreme and Appellate Courts, and as applied to me, is unconstitutional because it fails to provide

adequate due process safeguards such as an articulated burden of proof and guidelines for weighing the six statutory factors that the juvenile court must consider before transferring a minor to adult court.

FURTHER Affiant sayeth not.

Will Cater Jr.
WILL CATER, JR.

SUBSCRIBED AND SWORN TO
Before me this 5th day
of May, 1980.

[illegible]
NOTARY PUBLIC

Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-6825

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

WILL CATER, JR., Appellant

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee

MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO AFFIRM TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

WILLIAM J. SCOTT,
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No. 79-6825

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

WILL CATER, JR.,
Appellant,
v.
PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO AFFIRM TO THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT

INTRODUCTION

The Appellee, People of the State of Illinois, move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Appellate Court of Illinois on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

JURISDICTION

The jurisdictional requisites are adequately met as provided in 28 U.S.C. § 1257 (2). However, appellee submits that appellant has failed to submit a substantial federal question.

QUESTION PRESENTED

Whether the Illinois Juvenile Transfer Statute provides adequate procedural due process safeguards such as an articulated standard of evidence and guidelines for the relative weight to be given to the six statutory factors the Juvenile Court must consider before transferring a minor to Adult Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

The Illinois provision allowing for criminal prosecution of juveniles, Ill. Rev. Stat., 1977, Ch. 37, § 702-7, provides in pertinent part:

> (1) Except as provided in this Section, no minor who was under 17 years of age at the time of the alleged offense may be prosecuted under the criminal laws of this State or for violation of an ordinance of any political subdivision thereof...
>
> (2) If a petition alleges commission by a minor 13 years of age or over of an act which constitutes a crime under the laws of this State, and, on motion of the State's Attorney, a Juvenile Judge, designated by the Chief Judge of the Circuit to hear and determine such motions, after investigation and hearing but before commencement of the adjudicatory hearing, finds that it is not in the best interests of the minor or of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal laws.
>
> (a) In making its determination on a motion to permit prosecution under the criminal laws, the court shall consider among other matters: (1) whether there is sufficient evidence upon which a grand jury may be expected to return an indictment; (2) whether there is evidence that the alleged offense was committed in an aggressive and premeditated manner; (3) the age of the minor; (4) the previous history of the minor; (5) whether there are facilities particularly available to the Juvenile Court for the treatment and rehabilitation of the minor; and (6) whether the best interest of the minor and the security of the public may require that the minor continue in custody or under supervision for a period extending beyond his minority. The rules of evidence shall be the same as under Section 5-1 of this Act, but no hearing on such motion may be commenced unless the minor is represented in court by counsel. (b) If criminal proceedings are instituted, the petition shall be dismissed insofar as the act or acts involved in the criminal proceedings are concerned. Taking of evidence in an adjudicatory hearing in any such case is a bar to criminal proceedings based upon the conduct alleged in the petition.

STATEMENT OF THE CASE

Appellee adopts appellant's statement of facts.

REASONS FOR GRANTING THE MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM

I.

THE ILLINOIS JUVENILE TRANSFER STATUTE DOES PROVIDE ADEQUATE PROCEDURAL DUE PROCESS ENUMERATED IN THE SIX CRITERIA.

The starting point for any constitutional analysis of juvenile transfer statutes is this Court's decision in Kent v. United States, 383 U.S. 541 (1966). Recognizing the "critically important" nature of the transfer proceedings to the juvenile, this Court held that certain procedural safeguards must attend a decision to transfer:

> [W]e conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court; and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel. (383 U.S. at 557)

Although the Kent decision was decided primarily on statutory construction, the suggestion that the safeguards outlined there were guaranteed by due process was reinforced by a subsequent reference to Kent in In re Gault, 387 U.S. 1, 30 (1967). As the United States Court of Appeals for the Fourth Circuit has said:

> Whether Gault and Kent, taken together, form a constitutional imperative as to juvenile waiver proceedings is not self-evident. However, Kent and Gault do make it unquestionably clear that juvenile court proceedings that affect a young person's substantial rights "must measure up to the essentials of due process and fair treatment." [In re Gault (1967), 387 U.S. 1, 30, 87 S.Ct. 1428, 1445, 18 L.Ed.2d 527, 548].

Kemplen v. Maryland, 428 F.2d 169 (4th Cir. 1970), at 173.

In Mathews v. Eldridge, 424 U.S. 319 (1976), this Court listed three factors as being relevant in determining the requirements of due process in a given case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Goverment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 336.

The Illinois statute challenged here became effective on October 1, 1973. Under prior law, transfer of juveniles to criminal court had been largely a matter of prosecutorial discretion. (Ill. Rev. Stat., 1971, Ch. 37, par. 702-7 (3); People v. Sprinkle, 56 Ill.2d 257, 307 N.E.2d 161 (1974).) Unlike the prior law, the present statute closely parallels the District of Columbia transfer statute as interpreted by this court in Kent. Indeed the council commentary to the new provision indicates that the statute was amended in response to the Kent decision. (Ill. Ann. Stat., Ch. 37, par. 702-7, Council Commentary, at 81 (Smith Hurd Supp. 1979).) The six criteria that the statute sets out for the judge to consider closely follow the District of Columbia criteria set out in an appendix to the Kent opinion. (383 U.S. 541, 566, 86 S.Ct. 1045, 1060, 16 L.Ed.2d 84, 100.) Again the council commentary notes that, although prior law had not specified such standards, "[c]riteria for transfer suggested by the Kent case are now listed in the section." (Ill. Ann. Stat., Ch. 37, par. 702-7, Council Commentary, at 81 (Smith-Hurd Supp. 1979).)

In the present case the appellant contends that his transfer to adult court for prosecution under the Illinois Transfer Statute, Ill. Rev. Stat., Ch. 37, § 702-7 (3) (1973), denied him due process because the statute is vague because it does not state the standard of evidence to be applied and lacks sufficient procedural safeguards to prevent arbitrary transfers. Specifically he attacks the statutory standards because they (1) lack adequate due process within the six criteria established in the transfer statute; (2) do not articulate a standard of evidence, or the weight to be applied to the various statutory criteria. Two identical claims were raised in People v. Taylor, 76 Ill.2d 289, 391 N.E.2d 366 (1979),

and the court ruled that the Juvenile Transfer Statute did provide adequate procedural due process to a juvenile being adjudicated as either an adult or juvenile, and that an articulate standard of evidence and weight to be applied to each step was not necessary. In the case at bar, the appellant is trying to initiate a rehearing of some of the same issues that were brought forth in the Taylor case.

The similarity of the Illinois statute to the District of Columbia Act as modified by this Court to comport with due process requirements clearly demonstrates that the Illinois statute is constitutionally adequate, and as held by the Illinois Supreme Court in Taylor, that it adequately safeguards appellant's procedural due process rights.

In addressing appellant's attack upon the constitutionality of the Illinois Juvenile Transfer Statute, the Third District Appellate Court relied exclusively upon the recent opinion of the Illinois Supreme Court in Taylor. In this regard the Appellate Court simply stated:

> The Illinois Supreme Court in Taylor interpreted the juvenile transfer statute, as adopted by the legislature in response to the case of Kent v. U.S., (1966), 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84, as satisfying the constitutional requirements of due process. The Taylor opinion clearly recites the law on the multiple subissues argued by defendant Cater in claiming the statute here is unconstitutional. We adhere to the reasoning espoused in the Taylor opinion and conclude as the Supreme Court did that the transfer statute (Ill. Rev. Stat. 1977, ch. 37, par. 702-7) is constitutional. 78 Ill. App.3d at 985, 398 N.E.2d at 30-31.

It should be noted that the standards of Kent and of the Illinois statute require judicial discretion to be exercised within clear and objective standards which produces nondiscriminatory application. The only court which has considered the sufficiency of the present Illinois transfer statute has rejected the argument that the standards are ambiguous, holding that they are "specific enough to satisfy due process." United States ex rel. Pedrosa v. Sielaf, 434 F.Supp. 493, 497 (N.D. Ill. 1977).

TRANSFER HEARING IS NOT AN ADVERSARY HEARING

As held in Taylor, appellant could not claim he was denied due process because the transfer statute did not require the judge to state his reasons for ordering transfer or that the transfer hearing is adjudicatory in nature. The statute recognizes the hearing as dispositional in nature, determining the forum in which guilt or innocence is to be adjudicated. Taylor at 372. Faced with the same issue, the Supreme Court of Washington, in State v. Piche, 74 Wash.2d 9, 442 P.2d 632 (1968), cert. denied 393 U.S. 1041, 21 L.Ed.2d 588, 89 S.Ct. 666 (1969), stated:

> In determining whether the essentials of due process and fair treatment were provided in the instant case, it is important to keep in mind the exact nature of a juvenile court transfer hearing. Such a hearing does not result in a determination of delinquency ...; does not result in a determination of guilt as may a criminal trial; and does not directly result in confinement or other punishment as may both a delinquency hearing and a criminal proceeding. In short, the transfer hearing is not an adversary proceeding. Rather, the sole purpose of the transfer hearing, as we have recently said, is to determine 'whether best interests of the child and of society would be served by the retention of the juvenile court authority over him or whether the juvenile, under all the circumstances, should be transferred to be tried as an adult.' [Citation] We believe that this purpose may best be effectuated by the sound exercise of the juvenile court judge's discretion at an informal hearing, limited of course by the general requirements of due process and fair treatment, but not governed by the strict rules of procedure and evidence applicable at either a criminal trial or at a juvenile court delinquency hearing. (74 Wash.2d at 14, 442 P.2d at 635-636)

In Clemons v. State, 162 Ind. App. 50, 58-60, 317 N.E.2d 859, 864-65 (1974) the Indiana Appellate Court found the transfer determination by the juvenile judge to be analogous to the decision making performed by a trial judge in sentencing, since in both situations "consideration must be given to such factors as the previous record, background and possibility of rehabilitation of the individual before the court." See also State v. Carmichael, 35 Ohio St.2d 1, 298 N.E.2d 568 (1973); In re

II.

FAILURE TO HAVE AN ARTICULATED STANDARD OF EVIDENCE AND GUIDELINES FOR THE RELATIVE WEIGHT TO BE GIVEN TO THE SIX CRITERIA DOES NOT DEPRIVE THE APPELLANT OF HIS PROCEDURAL DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

The Illinois Supreme Court in Taylor rejected the contention that a standard of proof by "clear and convincing evidence" was constitutionally required, and also rejected the argument that due process required an articulated standard of evidence at a juvenile transfer hearing. In reaching this decision, the Court in Taylor compared the juvenile transfer procedure to a sentencing type procedure. The Court stated:

> [T]he State need only present evidence sufficient to persuade the trial court, in the sound exercise of its discretion, that in light of the statutorily prescribed criteria transfer is warranted. 391 N.E.2d at 372.

Since the juvenile transfer procedure is only a hearing the standard of evidence should not be the same as required at trial. The purpose of the Juvenile Transfer Hearing is not to determine the defendant's guilt or innocence, but whether to adjudicate him as a juvenile or adult.

Establishing guidelines to determine the relative weight to be applied to each of the six criteria is not appropriate as long as the final decision by the judge is supported by the six criteria under the Juvenile Transfer Statute. Since the purpose and results of a transfer hearing is not at all similar to those of an adjudicatory hearing, the transfer hearing need not and should not be limited in the manner urged by the appellant. In rejecting the appellant's contention the Appellate Court stated:

> Fundamental fairness does not require the juvenile judge to exercise his discretion with any degree of mathematical certainty. Not all of the factors set forth in the transfer statute need be resolved against the juvenile to justify a waiver of juvenile court jurisdiction. [People v. Taylor, (1979), 76 Ill.2d 289, 39 Ill. Dec. 103, 391 N.E.2d 366)]. We agree with the holding in Taylor, '[t]hat under our [present] statute the State need only present evidence sufficient to persuade the trial court, in the sound

> exercise of its discretion, that in light of the statutorily prescribed criteria transfer is warranted.' [76 Ill.2d at 303, 304, 29 Ill. Dec. at 109, 391 N.E.2d at 372]. The record manifestly supports the trial judge's finding that it was not in the best interest of the minor and the public to proceed under the juvenile court act, but that the best interest of the minor and the security of the public required that the minor defendant continue in custody for a period extending beyond his minority. The trial court did not abuse its discretion in permitting the criminal prosecution in the present case. [People v. Cater, 398 N.E.2d 28, 32.]

Furthermore in Taylor, at 373, the Court stated that the United States Supreme Court has recognized the constitutionality of the exercise of judicial discretion and lack of formal procedure inherent in the juvenile transfer proceeding. In Kent the court observed of the statute that it upheld:

> The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. (383 U.S. 541, 553, 86 S.Ct. 1045, 16 L.Ed.2d 84, 93.)

In Taylor, 371-372, the defendant contended that the transfer statute denied him due process by failing to articulate a standard of evidence, by prescribing for transfer hearings the relaxed rules of evidence used at dispositional hearings, and by failing to specify a formula according to which the judge must weigh the six criteria that the statute lists for his consideration. The statute provides that "[t]he rules of evidence shall be the same as under Section 5-1 of this Act" (Ill. Rev. Stat. 1975, ch. 37, par. 702-7 (3) (a)), and the council commentary refers, albeit with a typographical error, to the same section for the standard of proof. Section 5-1 provides:

> After adjudging the minor a ward of the court, the court shall hear evidence on the question of the proper disposition best serving the interests of the minor and the public. All evidence helpful in determining this question, including oral and written reports, may be admitted and may be relied upon to the extent of its probative value, even though not competent for the purposes of the adjudicatory hearing. (Ill. Rev. Stat. 1975, ch. 37, par. 705-1 (1).)

In Breed v. Jones, 421 U.S. 519 (1975), at 537, this court in reviewing its prior decisions affecting transfer hearings stated:

> ...[T]he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court. (Emphasis supplied.)

Indeed, five years prior to its decision in Breed, when this court decided that due process required proof beyond a reasonable doubt before a juvenile could be adjudicated delinquent, it specifically declined to apply that requirement to the pre-adjudicatory stages of juvenile proceedings, and indicated that the holding would not affect the "wide-ranging review of the child's social history." In re Winship, 397 U.S. 358 (1970), at 366-367.

Since the Illinois Supreme Court has affirmed in Taylor that the appellant received adequate procedural due process provided by the Illinois Juvenile Transfer Statute, as guided by this Court's decisions in Kent and In re Gault and Mathews v. Eldridge; the appellant in the case at bar has received the minimum requirement of procedural due process and therefore appellant's arguments have clearly failed to bring forth a substantial federal question.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depends is so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the Appellate Court of Illinois, Third Judicial District.

Respectfully submitted,

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No. 79-6825

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

WILL CATER, JR., Appellant

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee

CERTIFICATE OF SERVICE

I, Thomas E. Holum, a member of the bar of this Court and representing Appellee in this cause, certify:

1.) That I have served one copy of the Motion to Dismiss Or In The Alternative Motion to Affirm to the Appellate Court of Illinois, Third Judicial District, by depositing such copy in the United States mail at 160 North LaSalle Street, Chicago, Illinois 60601, with the proper postage affixed thereto, and with the envelope addressed as follows:

Robert Agostinelli
Deputy Defender
Office of the State Appellate Defender
Third Judicial District
628 Columbus Street, Suite 308
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2.) That all parties required to be served have been served.

Date: _____

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No. 79-6825

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APPELLANT'S REPLY MEMORANDUM

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The gist of the State's argument is that the Illinois juvenile transfer statute is constitutional because it is patterned after the District of Columbia juvenile transfer act which was reviewed by this Court in Kent v. United States, 383 U.S. 541 (1966). What the State ignores, however, is that Kent did not have before it the issues that are argued in the instant case. In Kent the defendant contended "that the waiver is defective because no hearing was held; because no findings were made by the Juvenile Court; because the Juvenile Court stated no reasons for the waiver; and because counsel was denied access to the Social Service file which presumably was considered by the Juvenile Court in determining to waive jurisdiction". Kent v. United States, 383 U.S. 541, 552

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*In footnote 2 of the appellant's original jurisdictional statement (page 12) it was incorrectly stated that the adopted Juvenile Justice Standards required a finding that there be "probable cause to believe the juvenile committed an offense that if committed by an adult, would be punishable by death or by imprisonment for more than twenty years". The underlined portion should read: "by death or by imprisonment for more than five years".

(1966). The issues concerning the burden of proof and the relative weight to be given the six statutory factors the juvenile court must consider were not at issue in Kent.

The State cites United States ex rel Pedrosa v. Sielaf, 434 F. Supp 494 (N.D.Ill, 1977) affirmed at 598 F2d 1064 (7th Cir. 1979) as the only federal court case which has considered the constitutionality of the Illinois transfer statute. (State's Motion to Dismiss p.5) While it is true that the cited decision upheld the constitutionality of the Illinois juvenile transfer statute, the exact nature of the attack upon the statute was quite different from that at bar. In United States ex rel Pedrosa v. Sielaf, it was argued that the statute was unconstitutionally vague. No argument was made, as in the instant case, that due process mandated an articulated standard of proof.

It is further argued by the State that a transfer hearing is not adversarial in nature, but rather a dispositional type proceeding. This was the conclusion reached by the Illinois Supreme Court in People v. Taylor, 76 Ill. 2d 289, 391 N.E. 2d 366 (1979). What the State and the court in Taylor ignore, is that unlike the dispositional function, the trial judge at the transfer hearing has heard no previous evidence concerning the case and does not have before him a finding of guilt. A burden of proof is necessary at these proceedings because factual determinations are required. The burden is necessary to minimize error. (See Jurisdictional Statement pp. 14-15).

Furthermore, to argue that a juvenile transfer hearing is not adversarial in nature is to ignore reality. The potential consequences of a transfer to adult court are much more severe than the maximum sanctions available to the juvenile court in a

delinquency proceeding. (See Jurisdictional Statement p. 10). If anything the transfer hearing is the most adversarial proceeding conducted by a juvenile court.[1]

With respect to the issue of burden of proof, the State argues that since the "juvenile transfer procedure is only a hearing the standard of evidence should not be the same as required at trial" (p. 7). First, appellant does not argue that the standard of proof must be the same as that at a criminal trial. Appellant contends that there must be some articulated burden of proof and that a clear and convincing standard would be most appropriate considering the interests involved. Moreover, the State's reliance on the fact that the juvenile transfer procedure is "only a hearing" as opposed to a criminal trial is not persuasive in light of the fact that Addington v. Texas, 441 U.S. 418 (1979) and United States v. DiGileo, 538 F2d 972, 988 (CA3, 1976) also involved "mere" hearings.

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[1] As noted in the Jurisdictional Statement (p. 10-11), there are several severe consequences attendant upon a transfer of a juvenile. An additional consequence, illustrated in the case of People v. Taylor, 76 Ill. 2d 289, 291 N.E. 2d 366, 375 (1979), involves a situation where the minor commits an offense at age 16, is transferred to adult court but not sentenced as an adult until age 17. The 17 year old is then sentenced to an adult prison where he is subjected to the hardening influence and possible abuse from older fellow inmates. However, the juvenile who remains within the juvenile system, even if his dispositional (sentencing) hearing is held after he reaches age 17, may not be sentenced to an adult institution. Ill. Rev. Stat. 1977, Ch. 37, §705-10.

In summary, the questions presented by this appeal have not been implicitly or explicitly decided by this Court's previous decisions. Furthermore, a juvenile transfer hearing involves factual determinations in an adversarial setting and thus due process requires the existence of an articulable standard of proof. Since the questions presented are substantial, plenary consideration is required for their resolution. Alternatively, appellant again requests that this Court summarily reverse the judgment below.